Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

AIR POUCH
PRIORITY

~~UNCLASSIFIED~~
(Security Classification)

DO NOT TYPE IN THIS SPACE

399.731/2-1258

FOREIGN SERVICE DESPATCH

FROM : AmEmbassy, Habana (196)

626
DESP. NO.

TO : THE DEPARTMENT OF STATE, WASHINGTON.

February 12, 1958
DATE

REF :

For Dept. Use Only	ACTION	DEPT.
	L-2	RMR-2, IRC-8, EUR-5, D-4, OIC-1, E-4, U/FW-2
	REC'D 2/13/58	OTHER CIA-14, Com-8, IN-7, ARMY-4

SUBJECT: Study of Dr. García Amador on Exploitation and Conservation of the Resources of the Sea.

Reel # 408

There is enclosed a copy of the English translation (provisional publication) of Dr. Francisco García Amador's study entitled "The Exploitation and Conservation of the Resources of the Sea: A Study of Contemporary International Law". The book was originally published in Spanish in 1956. As explained in the preface to the English edition, the provisional English version was prepared in anticipation of the United Nation Conference on the Law of the Sea, scheduled to open in Geneva on February 24, 1958.

Additional copies of the study are being forwarded under separate cover for possible use by the United States Delegation to the Geneva meeting.

STAT

For the Ambassador:

Daniel M. Braddock
Counselor of Embassy

Enclosure: Publication

POL:WGBowdler:hs
REPORTER

~~UNCLASSIFIED~~

INFORMATION COPY
Retain in divisional files or destroy in accordance with security regulations.

THE ABOVE INSTRUCTION APPLIES TO THE DEPARTMENT ONLY

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

F. V. GARCIA-AMADOR

Member of the International Law Commission of the United Nations. Representative of Cuba in the Inter-American Council of Jurists.

STAT

THE EXPLOITATION AND CONSERVATION OF THE RESOURCES OF THE SEA

A STUDY OF CONTEMPORARY INTERNATIONAL LAW

(Provisional Publication)

La Habana

1957

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

F. V. GARCIA-AMADOR

Member of the International Law Commission of the United Nations. Representative of Cuba in the Inter-American Council of Jurists.

THE EXPLOITATION AND CONSERVATION OF THE RESOURCES OF THE SEA

A STUDY OF CONTEMPORARY INTERNATIONAL LAW

(Provisional Publication)

La Habana

1957

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

F. V. GARCIA-AMADOR

Member of the International Law Commission of the United Nations. Representative of Cuba in the Inter-American Council of Jurists.

THE EXPLOITATION AND CONSERVATION OF THE RESOURCES OF THE SEA

A STUDY OF CONTEMPORARY INTERNATIONAL LAW

(Provisional Publication)

La Habana

1957

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

P R E F A C E

In the Spring and Summer of 1956, the author delivered a few lectures on the "Legal Regime applying to the Use and Conservation of the Resources of the Sea" at the Escuela de Funcionarios Internationales in Madrid and the Institut Universitaire de Hautes Etudes Internationales in Geneva. These lectures, after extensive re-drafting, were published in Spanish under the tittle "La Utilizacion y Conservation de las Riquezas del Mar - Estudio de Derecho International Contemporáneo" Editorial Lex, La Habana, 1956). During its eleventh session the United Nations General Assembly considered the International Law Commission's final report on the law of the sea and decided that an international conference of plenipotentiaries should be convoked to examine the various problems envolved in the development and codification of the subject. The present English version is published now in a provisional mimeograph form in view of said conference, to be held in Geneva from 24 February 1958.

The use and conservation of the wealth of the sea has come to be one of the most topical questions in contemporary international law. As will be explained in greater detail in the Introduction, the extraordinary development in the techniques for exploring and exploiting these natural resources has had quite important repercussions in the economic and social apheres. Both phases of this development have naturally given rise to new needs and interests, the provision of legal safeguards for which has necessitated a substantial revision of certain traditional concepts and principles

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

of the international law of the sea. It is the object of the present study to examine this new legal system at its present stage of development with due reference to the technical, scientific and socio-economic aspects of the subject and according to a plan in line with the program followed in this field by the United Nations.

Consistently with its purpose, the study is partly historical and analytic, and partly a critique of the ideas and events that are effecting a profound transformation in the international law of the sea. We have accordingly endeavoured to assemble and set out in systematic fashion the antecedents of the various problems and to pass as objective a judgment as possible on their solutions. As far as the latter aspect is concerned, we must admit to having let ourselves be guided in expressing an opinion or passing judgment by the following sound criterion: that the new legal order must recognize and safeguard by just and effective rules the legitimate interest of all in the rational utilization of the resources of the sea. In so doing, however, we do not feel that we have in any way failed to preserve an objective standpoint; on the contrary we have paid heed to one of the essential functions of law in international relations. At all events, we wish to emphasize in this connexion the strictly personal character of the views and judgments contained in this study.

F. V. GARCIA AMADOR

Havana, November 1957.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

TABLE OF CONTENTS

Chap. — Page

I.- INTRODUCTION: THE FREEDOM OF THE SEAS AND CONTEMPORARY PROBLEMS

1. The principle of the freedom of the seas and the use and conservation of their resources: The two traditional sub-divisions of the seas.- The resources of the high seas as res communis and as an inexhaustible store of wealth.- The traditional concept of the freedom of the seas and contemporary problems..... 2

2. Study of the question by international organizations: the United Nations and the Organization of American States: The league of Nations and the Conference at The Hague (1930).- Programme of work of the United Nations.- The work of the Organization of American States.- Method of study followed by these organizations..... 4

3. The three aspects of the question: method and plan of the present study: The opinion of Professor Jessup.- The technical and scientific aspect.- The economic and social aspect.- The legal aspect. Plan of this study..... 9

II.- THE REGIME OF THE SEA AND THE NEW EXTENSIONS OF STATE COMPETENCE.

4. How the sea came to be divided into different areas: The regime of the sea in Antiquity: Concepts of the Roman jurists.- The earliest claims in the Middle Ages and the private law character thereof.- Later claims and their public character.- Development and influence of doctrine: the theoires of Mare Liberum and of Mare Clausum.- Definition and acceptance of the various sub-divisions of the sea.....12

5. The high seas and the principle of the freedom of the seas: Juridical nature of the high seas.- The The high seas as a means of communication and source of wealth.- The meaning of the principle of the freedom of the seas.- Basis of the freedom of fishing.....17

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Chap. Page.

6. The territorial sea: its juridical status, breadth and delimitation: The idea of exclusiveness attaching to the territorial sea.- Juridical status of the natural resources of this area of the sea.- Various questions involved in the problem of the breadth of the territorial sea.- Systems for the delimitation of the territorial..... 22

7. The rule of the marine league and the codification Conference at the Hague (1930): The general consensus in favour of the three miles limit.- Other limits proposed or established in practice.- Gradual abandonment of the marine league rule.- Factors that prevented agreement at the Conference of the Hague..... 26

8. Subsequent development of practice and present state of the question: The ideas of "indivisibility" in the concept of the territorial sea.- Is there an international rule fixing the breadth of the territorial sea?.- Is a matter for municipal or for international law?.- Conditions determining the validity of an extension of the limit beyond three miles.- Must a maximum limit and a uniform breadth be fixed for all States?.- The breadth of the territorial sea and the other extensions of States competence..... 30

9. The baseline of the territorial sea and the new concept of "internal waters": "Internal waters": their juridical nature and new areas included therein.- The system of straigh baselines.- The Codification Conference at the Hague.- Attitude of the International Court of Justice.- Position of the International Law Commission..... 41

10. Other zones of exclusive exploitation; the "epicontinental sea" and the 200-mile "Maritime zone": "Zones of exclusive exploitation".- The "right of property and protection" over fur seals.- The "principle of abstention".- Cases envisaged by the Inter-American Council of Jurists.- Earliest formulations of the doctrine of the continental shelf.- Claims to an "epicontinental sea": Mexico and Argentina.- Iceland's "exclusive jurisdiction over fisheries in the coastal area".- The 200-mile "Maritime zone": its economic and social bases.- The scientific bases of the 200-mile "maritime zone".- Juridical nature of the maritime zone and objects of the Saantiago Declaration.- Considerations of the legitimacy of such extensions of competence..... 49

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Chap. Page.

11. Areas of specialized competence or "contiguous zones": their juridical nature and the interests the area designed to protect: Nature and function of the "contiguous zones".- Origin and development of the institution; the Conference of The Hague.- Acceptance and subsequent development of the institution.- The "contiguous zones" as extensions of the sphere of validity of State competence.- The institution of the "contiguous zone" and fishing interest..... 65

III.- THE SUBMARINE AREAS AND THE RIGHT TO USE THEIR RESOURCES.

12. Terminology and definitions in connexion with submarine areas: Configuration of the submerged land.- Scientific Terminology and definition.- The three broad categories of submarine areas..... 74

13. The natural resources of the subsoil and seabed: The submarine areas as a source of wealth.- Petroleum and other resources of the subsoil.- The vegetable and animal wealth of the seabed.- The "benthonic environment"; sedentary and moving species..... 76

14. The legal question: its various aspects: Juridical relation of the submarine areas to the territorial sea.- Criteria for determining the seaward limit of these areas.- Nature and extent of the rights of the coastal State.- Juridical status of the superjacent waters.- Problems connected with the exercise of the rights of the coastal State and the other aspects..... 79

15. Nature and extent of national claims: The earliest national claims.- The Anglo-Venezuelan Treaty of 1942.- United States Proclamation of 1945.- Other claims showing the same trend.- Nature and scope of the claims of Mexico and Argentina.- Position of the countries on the South Pacific seaboard.- The other Latin-American claims..... 82

16. Position of the Inter-American organization and Conferences: The first studies and decisions on the subject.- The resolution of the 10th Inter-American Conference (Caracas, 1954).- The Third Meeting of the Inter-American Council of Jurists (Mexico, January 1956).- Position of the Inter-American Specialized Conference (Ciudad Trujillo, March 1956)..... 88

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Chap. Page.

17. The International Law Commission's Draft: Text of the 1956 draft.- Submarine areas covered by the draft.- Nature of the rights of the coastal State. Meaning of the term "natural resources".- Legal regime of the superjacent waters and the air space above them.- Limitations on the exercise of the rights of the coastal State.- System for determining the boundaries of submarine areas between various States.- Method of settling disputes.- The spirit of the Commission's draft..... 98

18. Nature and basis of the rights of the coastal State.-The concept of specialized sovereign competence.- The traditional conception of the basis of the rights.- The socio-economic interest of the coastal State and other factors and considerations.....107

IV.- THE CONSERVATION OF THE LIVING RESOURCES OF THE HIGH SEAS.

19. The technical and scientific aspect: terms of reference and agenda of the Rome Conference (1955): More important antecedents of the Rome Conference.- Resolution 900 (IX) of the General Assembly.- The agenda of the Conference.- Preparatory work and direction taken by its deliberations..... 113

20. The utilization of the living resources of the sea and the problem of their conservation: Current aspects of the problem.- Antecedentes of conservation measures and programmes.- Reaction against the regulation of fishing.- Origin and development of the now dominant theory.- Cases in which conservation in unnecessary and unjustified..... 118

21. Present aims of conservation: The socio-economic aspect of conservation.- The Cuban and Mexican thesis at the Rome Conference.- Acceptance of the thesis by the Conference..... 123

22. The question of competence: collective regulation and unilateral regulation by the coastal State: General formulation of the question.- The three fundamental cases that may arise.- Considerations pointing to the "special interest" of the coastal State.- The system of international co-operation.- Trend in favour of unilateral regulation.- Positions adopted in the Rome Conference..... 127

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Chap. Page.

23. The system of the Cuban and Mexican draft: General character and scope of the proposal.- Point of departure and objects of the system.- The discussion of the draft.- The procedural question raised in connexion with the draft.- Conclusions of the Conference on the substantive question..... 133

24. Reconsideration of the question by the International Law Commission: The draft prepared by the Commission in 1953.- Text of the proposal which we submitted to the Commission at its seventh session (1955).- The main principles underlying the proposal. Recognition and protection of the special interest of the coastal State.- Loopholes and deficiencies in the traditional system.- The freedom of fishing and the doctrine of the "abuse of the right".- The right to take unilateral action and the protection of the interests and rights of third parties. Method for settling disputes: Compulsory arbitration..... 140

25. System of the new draft of the International Law Commission: Comments of governments and inter-American resolutions.- The freedom to fish under contemporary international law.- Meaning of the phrase "conservation of the living resources of the high seas".- Conservation as a right and as a duty of States.- Obligation to adopt collective measures Applicability of the measures adopted by third States.- Nature and scope of the "special interest" of the coastal State.- The right to unilateral action: circumstances and conditions of its exercise. Case of a non-coastal State with a special interest in conservation.- The system of compulsory arbitration envisaged in the draft.- Criteria to be applied in settling various disputes.- Suspension of the measures in dispute.- Nature and scope of the decisions of the arbitral commission..... 152

V.- CONCLUSION: THE NEW INTERNATIONAL LAW OF THE SEA.

26. The new concept of the "special interest" of the coastal State: The special interest of the coastal State under traditional international law.- The new concept of the "special interest" and its two main forms of expression in contemporary law.- Other forms of expression of this concept..... 175

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Chap. Page.

27. The protection of the "general interest" under the new legal order: The "general interest" also an essential object of legal protection.- Safeguards for the general interest in the system applying to the submarine areas.- Safeguards for the general interest in the system for the conservation of the living resources of the high seas..... 177

28. The problem of the breadth of the territorial sea: Point of departure of considering and settling this problem.- Situations settled by international practice.- Criteria for dealing with other situations.- Special position when "historic" fishing rights exist.- Forms and procedures for the settlement of disputes..... 178

29. Role of the principle of the freedom of the seas of the seas in contemporary international law: The need to revise the traditional concept of the freedom of the seas.- Opinion of Professor Gidel.- Position of the International Law Commission.- The new conception of the principle of the freedom of the seas..... 182

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

CHAPTER I

INTRODUCTION

THE FREEDOM OF THE SEAS AND CONTEMPORARY PROBLEMS

The exploitation and conservation of the natural resources of the sea constitute one of the most topical problems of contemporary international law. The main reason for this lies in the extraordinary development of techniques for exploring these resources and turning them to account. Advances in techniques have made it possible both to turn to account resources hitherto unknown or which could not be tapped, and to exploit other resources on an immeasurably more intensive scale than was previously feasible. The two facts in turn have inevitably led to a corresponding increase in the importance of such resources for the economy or food supplies of a large number of countries. To grasp the full implication of this it must be born in mind that the agricultural and mineral resources of the earth are daily becoming less and less adequate to satisfy industrial and food requirements. From this point of view especially, the living resources of the sea have come to constitute one of the richest stores of food that the world possesses.

Technical developments have also had their repercussions on the yield of some resources of the sea. As long as the means and methods of fishing, whaling and sealing did not permit of large-scale operations there was no reason why exploitation of the living resources of the sea should affect their yield, at least to any appreciable extent. However, with the development of much more effective means and methods enabling the resources to be worked intensively, the situation radically changed. Catches became so large as to bring the risk of "over-fishing" of some species, and, what was more, some of the equipment used affected in some cases the living conditions and ecological environment of those and other species. Thus, the intensity with which these living resources of the sea can be exploited and the effects of the use of certain equipment and appliances have resulted in some of the resources being exposed to the risk of depletion, impairment and even annihilation. Once it was realized that fishing, whaling and similar activities could adversely affect the yield of the sea's resources, there immediately arose the question of the need to conserve them. As will be seen later, the question of "the conservation of the living resources of the sea" is coming more and more to the fore nowadays, sometimes in the shape of an urgent problem.

The technical phenomena to which we have just referred and their economic and social repercussions have naturally given birth to new needs and interests as far as the exploitation and conservation of the resources of the sea are concerned. But the recognition of these needs and the legal protection of these interests are not always compatible with certain traditional concepts and principles of the international law of the sea and the latter, evolved at a time when the situation was very different from the one we have described, will perforce need revising in the light of present needs and interests. Indeed, this revision has already begun and it

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

should surely be possible to carry it through without relinquishing any of fundamental postulates of the international law of the sea or depriving any legitimate interest of proper safeguards. But let us examine in greater detail the way in which the problems set by the use and exploitation of the sea as a source of wealth have been formulated in present-day international law.

1. THE PRINCIPLE OF THE FREEDOM OF THE SEAS AND THE USE AND CONSERVATION OF THEIR RESOURCES

The two traditional sub-divisions of the sea

From the standpoint of the use and conservation of resources of the sea, traditional international law recognized the sub-division of the sea into two areas only: the territorial sea (together with the internal waters and seas) and the high seas or open sea. The dominating principle of the regime of the territorial sovereignty of the coastal State. The dominating principle of the regime of the high seas, on the other hand, was the freedom of the seas, involving the right of all States to use and exploit its resources. This right was based on two premisses. Firstly the resources in question were regarded as res communis in that they were not liable to appropriation or exclusive use and exploitation by any single State. Secondly, all such resources being regarded as essentially inexhaustible, it never occurred to anyone that they might need to be conserved and, hence, there was felt to be no justification for any kind of restriction on their free use. Nowadays, however, these two premisses underlying the principle of the freedom of the seas must be viewed in the light of the situation brought about by technical developments in the exploration and exploitation of the resources of the sea.

The resources of the high seas as "res communis" and as an inexhaustible store of wealth.

It is, for example, easy to see that the first of the two premisses no longer holds so absolutely as in the past, it being no longer possible to describe the entire resources of the high seas as res communis, when the natural resources of the bed and subsoil of the continental and insular shelves and of other submarine areas adjacent to the territory of coastal States have ceased to have that status in law. Under traditional international law, the coastal State was acknowledged to have sovereign rights only over that part of the sea-bed immediately beneath its territorial sea, outside which area the principle of the freedom of the seas was considered to apply with respect to the use both of the waters and the sea-bed and subsoil beneath them. Fairly recently, however, many States with the acquiescence of the others and without being called upon to fulfil the condition of virtual or effective occupation, have claimed the exclusive right to survey and exploit the natural resources of the submarine areas adjacent to their territories.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

The second basic premiss of the freedom of use and exploitation of the resources of the high seas has suffered a like fate. The fact that it is frequently, and at times urgently, necessary to take measures to conserve such resources makes it impossible to continue regarding them all as inexhaustible. But as the measures in question necessarily involve restrictions on the free use of the resources, the question which then arises is how the may be taken. In the past, strict respect for the principle of the freedom of the seas left only one way open: that of international co-operation, i.e. concerted action by all States concerned in the use and conservation of the resources in point. But can one allow the resources to be exposed to the risk of being depleted, impaired or annihilated while States are agreeing on suitable measures? What is to be done in face of a real and urgent need to take steps to conserve them? Traditional international law could give no answer to this problem because the only possible solution was incompatible with the absolute freedom enjoyed by all States to use and exploit the resources. But a certain number of States having of late taken measures of conservation unilaterally or proclaimed the right to take them in zones of the high seas contiguous to their territorial waters, the "special interest" of the States in question in maintaining the yield of the living resources of the sea in those zones has come to be recognised by international bodies an conferences. The legitimate nature of this interest, subject to the conditions and limitations to which unilateral action would remain subordinated in order to safeguard the equally legitime interests of third States, has given currency to the idea of acknowledging this other right of the coastal State in the high seas.

The traditional concept of the freedom of the seas and contemporary problems

When the two premisses on which the right to the free use of the resources of the sea is founded are viewed in the light of the foregoing considerations, it will be readily understood that the traditional concept of this right is no longer in harmony with the present state of affairs. As a result of the new extensions of State competence already mentioned and of others to be studied later, new marine areas and special rights in zones hitherto part of the high seas have come into being. But this legal trend in no way implies that the principle of the freedom of the seas in those zones has given way to the principle of the territorial sovereignty of the coastal State. As will be seen when we study the scope of the new extensions of competence, in no case has the law of the high seas been affected in its essentials. In the case of the extension of sovereign jurisdiction of the State over the submarine areas adjacent to its territory, the exclusive rights attributed to the State do not affect the status of the superjacent waters as part of the high seas. Similarly, the State's right to regulate unilaterally the use of the living resources in zones contiguous to its territorial sea is no more than highly

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

specialised extension of competence, recognition of which would equally not affect substantially the right of the other States concerned to use those resources.

In connexion with the foregoing one cannot fail to note the acute, and steadily worsening, crisis through which the traditional rule of the three-mile limit on the territorial sea is now passing. Though no greater breadth has been established under international law and no right accorded the coastal State of fixing that breadth unilaterally and at its own discretion, it is impossible to disregard the very real consequences that the lack of uniformity on this point in present-day international practice has and will increasingly tend to have. To this must be added the fact that, owing to the adoption by some States of the system of straight baselines to measure their territorial sea, the concept of "internal waters" has acquired a broader connotation embracing wide belts of water previously part of the high seas. Finally, there is a tendency to recognize in specific cases the exclusive right of the coastal State to exploit the living resources of certain areas of sea, or to exploit particular species outside its internal waters and territorial sea. It will be readily understood that this tendency, as in the case of the other two areas of sea just referred to and unlike what occurs in the case of a mere extension of specialized competence, implies a right affecting in its essentials the freedom to exploit the living resources of the sea. In the case of the areas of sea over which the sovereignty of the coastal State extends or to the rights claimed by the latter for itself or its nationals, the extension of competence involves the exclusion of third States from the use and exploitation of all or some of the resources of the areas in question.

These, then, in broad outline are the problems set in present-day international law by the use and conservation of the resources of the sea. We will dwell at length on them in later chapters in order to see how far it has proved necessary and feasible to revise the principle of the freedom of the seas to meet the new needs and interests underlying those problems. But first let us briefly examine the way which international organizations have dealt with the problems, and outline the three basic aspects of their study and solution.

2. STUDY OF THE QUESTION BY INTERNATIONAL ORGANIZATIONS: THE UNITED NATIONS AND THE ORGANIZATION OF AMERICAN STATES

By reason of their growing importance and topicality the problems relating to the use and conservation of the resources of the sea were bound to attract the attention of international organizations. The legal implications we have just outlined make them an inevitable item in those organizations' programmes for the development and codification of international law. In more recent years particularly, the subject has become sufficiently ripe for the organizations to be able to broach the task of

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

formulating the principles and rules of a legal system catering for the new needs and for all the interests involved. The task, though not easy, is not an impossible one. In any case, it is one which had to be faced, for otherwise the various consequences of the present incompatibility between the traditional system and contemporary problems would very soon have become more serious.

The League of Nations and the Conference at The Hague (1930)

Credit must go to the League of Nations for taking the first step in this field. One of the three subjects on the agenda of the Conference for the Codification of International Law, held under the auspices of the League at The Hague in 1930, covered one of the questions to which we have referred: the regime of the territorial sea. Although the Conference, largely owing to the diversity of opinion on the breadth to be attributed to that area of the sea, was unable to reach agreement or any final conclusions, in the long run the results of its deliberations were not entirely negative, since they brought to light some of the new aspects of the problem and enabled ideas and concepts hitherto unknown to international law to be defined. As will be seen further on, in one sense the Conference accomplished rather more, laying the foundation for certain concepts and principles which were later to become part of the international law of the sea. Unfortunately, the unduly pessimistic impression left by the Conference did not create a propitious atmosphere for further efforts on the part of the League of Nations in the years following 1930.

After the Second World War, when the new international organizations once more took up the work of developing and codifying international law, a more optimistic and propitious atmosphere prevailed. One thing which greatly contributed to making it so was the fact that one after the other various States, provoked or encouraged by the two Proclamations of the President of the United States (1945) on the continental shelf and on conservation of fisheries, issued declarations or enacted laws on the subject, thereby creating a situation which clamoured for the study and settlement of the question by international organizations. This time it was the International Law Commission of the United Nations which took the lead.

Programme of work of the United Nations

The International Law Commission, at its first session (Lake Success, 1949) chose the "Regime of the high seas" as one of its priority topics in the work of codification, and towards the end of the same year, the General Assembly recommended that the Commission include in its list of such topics the "Regime of the territorial sea". After considering the reports by Professor Francois, its Special Rapporteur on the subjects together with the comments of governments, the Commission drew up various drafts on two problems of the regime of the high

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

seas: the "Continental shelf" and "Fisheries". When these drafts were discussed in the Assembly, the delegation of Iceland raised the question of the unity of the topic, stressing the inadvisability of considering any of its various aspects and problems separately. The Assembly, "having regard to the fact that the problems relating to the high seas, territorial waters, contiguous zones, the continental shelf and the superjacent waters are closely linked together juridically as well as physically", accepted this view and consequently decided not to deal with any of the problems until all had been studied and reported upon by the International Law Commission (resolution 798 (VIII)). At the next session of the Assembly (1954), a group of delegations proposed that it reconsider this decision and partly modify it on the ground that some of the problems whose study had already been completed by the Commission were in urgent need of solution. This move provoked an extensive discussion of the subject and led to a new resolution of the Assembly, this time adopted unanimously, which struck a compromise between the two points of view which had already emerged the previous year. Under this resolution, the Assembly re-affirmed the idea of the unity of the subject but requested the International Law Commission "to devote the necessary time to the study of the regime of the high seas, the regime of territorial waters and all related problems in order to complete its work on these topics and submit its final report in time for the General Assembly to consider them as a whole, in accordance with resolution 798 (VIII), at its eleventh session" (resolution 899 (IX)).

On the same day the General Assembly adopted another resolution on the problem of the conservation of the living resources of the sea. Considering that this specific problem, on which the International Law Commission had already prepared a draft, possessed technical and scientific aspects beyond the competence of the Commission, the Assembly agreed to convene an international conservation of the living resources of the sea and to make appropriate scientific and technical recommendations which shall take into account the principles of the present resolution and shall not prejudge the related problems awaiting consideration by the General Assembly". The report of the Conference was to be referred to the International Law Commission "as a further technical contribution to be taken into account in its study of the questions to be dealt with in the final report which it is to prepare pursuant to resolution 899 (IX) of 14 December 1954" (resolution 900 (IX). In accordance with the convening notice, the "International Technical Conference on the Conservation of the Living Resources of the Sea" met at the headquartes of the United Nations Food and Agriculture Organization (Rome) on 18 April 1955 and submitted a report which was considered by the Commission at its seventh session, held immediately after the Conference. In its eighth session the International Law Commission finished its work on the law of the sea and submitted to the General Assembly the final

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

report envisaged in resolution 798 (VIII). During its eleventh session the Assembly considered the report and decided, in accordance with a recommendation of the Commission, "that an international conference of plenipotentiaries should be convoked to examine the law of the sea, and to embody the results of its work in one o more international conventions or such other instruments as it may deem appropiate". This conference, as anticipated in the Preface, will meet in Geneva, from 24 February 1958. (Resolution 1105 (XI)).

The work of the Organization of American States

The Organization of American States has also undertaken the study of marine questions as part of its activities in connexion with the development and codification of international law . To some extent its programme of work runs parallel to that of the United Nations. At its first meeting (Rio de Janeiro, 1950), the Inter-American Council of Jurists agreed to commence study of the "System of Territorial Waters and Related Questions", entrusting the preparatory work for that purpose to its Permanent Committee, the Inter-American Juridical Committee of Rio de Janeiro. At its second meeting, (Buenos Aires, 1953), it took cognizance of the report prepared by the Committee but agreed to ask the latter to continue the study of the subject and submit a more detailed report, giving it at the same time some guidance which involved pronouncing on the substance of certain aspects of the topic. The following year, at the instance of the delegation of Ecuador, the Tenth Inter-American Conference (Caracas) convened a Specialized Conference "for the purpose of studying as a whole the different aspects of the juridical and economic system governing the submarine shelf, oceanic waters and their natural resources in the light of present-day knowledge" (resolution LXXIV). As will be seen, the Caracas Conference likewise made certain pronouncements bearing to some extent on the substance of some aspects of the topic.

Under the resolution of the Caracas Conference, the competent inter-American bodies among which was the Inter-American Council of Jurists, were to co-operate in the preparatory work for the Specialized Conference. At its third meeting (Mexico, January 1956), the Council once more deliberated on the "system of territorial waters and related questions" and framed, under the title "Declaration of Mexico City on the Principles Governing the Regime of the Sea", various statements on the following subjects: breadth of the territorial sea, continental shelf, conservation of the living resources of the high seas, baselines and bays (resolution XIII). In the case of some of these questions, the Council's statements involved judgments and views on their various scientific and economic aspects, the study and treatment of which had been expressly entrusted to be the Specialized Conference. Nevertheless, by a decision of that same Council, resolution XIII, together with the records of the Meeting at which the subject was considered, were

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

transmitted to the Specialized Conference as a preparatory study (resolution XIV). The Inter-American Specialized Conference on "Conservation of Natural Resources: The Continental Shelf and Oceanic Waters", met at Ciudad Trujillo, Dominican Republic, in March of the same year. After having "carried out the comprehensive study that was assigned to it", as stated in the preamble to the resolution it adopted, the Conference succeeded in reaching substantive conclusions on one subject only, namely that relating to the right of the coastal State to exploit the natural resources of the sea-bed and subsoil of the submarine areas adjacent to its territory. Regarding the other subjects considereded (regime of the waters which cover the submarine areas, classes of living resources belonging to the sea-bed or to the superjacent waters, conservation of the living resources of the high seas, and the breadth of the territorial sea), the Conference did no more than record the absence of agreement between the States which took part in it. Accordingly, it recommended that the American States continue diligently with the consideration of the matters on which agreement had not been reached, "with a view to reaching adequate conclusions".

Method of study followed by these organizations

As has no doubt been observed, the work of developing and codifying the international law of the sea is being conducted according to a coherent and systematic plan of work. In the first place, the legal bodies have generally prepared their drafts on the basis of the tecnical and other data at their disposal. For example, the International Law Commission's new draft on the conservation of the living resources of the sea was prepared at its seventh session (1955) in the light of the conclusions of the Rome Conference, which also served as a basis for the decision of Ciudad Trujillo on the exploitation of the natural resources of submarine areas. In the second place, efforts have been made to ensure the best possible co-ordination between the work of the United Nations and that of the Organization of American States. As a result of this co-ordination, the International Law Commission at its eighth session (1956) modified the decision it had adopted in its 1953 draft on the "continental shelf" to bring it into line with the conclusions reached on the subject by the Specialized Conference.

In connexion with the first point, the two organizations have adopted the same standpoint for studying and considering the various problems and aspects of the juridical regime of the sea, namely, that of the unity of the topic. The General Assembly of the United Nations acknowledged this unity and adopted it explicitly as the basis for its programme of work. But the Organization of American States at the Caracas Conference developed this idea to some extent and stated it in broader terms. As will be recalled while General Assembly earlier resolutions refer to the physical and juridical unity of the various marine areas, only in one case do they take account of

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

the close link between the various aspects which must be considered in order properly to formulate and solve the problems raised by the use and conservation of the resources of the sea. The Inter-American Conference, on the other hand, noting this other link, gave it more general application, deciding that all problems would be considered from that standpoint. In its resolution 1105(XI), the General Assembly, quoting from the report of the International Law Commission, indicated that the conference would examine the law of the sea "taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem".

3. THE THREE ASPECTS OF THE QUESTION: METHOD AND PLAN OF THE PRESENT STUDY

The opinion of Professor Jessup

This approach to the problems relating to the use and conservation of the resources of the sea is of particular importance. It was referred to by Professor Philip C. Jessup in a series of lectures to the Académie de Droit International of the Hague in 1929, in order to bring out the need for examining the problems in the light of their three fundamental aspects: juridical, economic and scientific. The existence of these three aspects is fairly obvious, and their close interdependence emerges with equal clarity as soon as appropriate solutions are sought. Let us first see what constitutes the technical and scientific aspect and the part it plays.

The technical and scientific aspect

The information which science and technique have to offer with regard to fisheries is of fundamental importance in adopting measures or programmes for the conservation of the living resources of the sea. It alone can determine whether there is a real need for conservation and, if so, to what extent it is due to the intensity of fishing, to the equipment and methods employed or to purely biological and natural factors. Scientific and technical knowledge is likewise essential in formulating a conservation plan and deciding on the type of measures to be applied to the particular fishing zone or area in question or the particular species it is desired to conserve. The investigate these questions a host of national and international bodies has been set up, whose studies and recommendations have served as a basis for the conservation measures and programmes adopted either unilaterally or by the concerted action of the States concerned. The General Assembly of the United Nations in convening the Rome Conference, had this fact in mind when it stated that "The problem of the international conservation of fisheries involves matters of a technical character". The same is true of the exploitation of the natural resources of the submarine areas. The definition and delimitation of these areas is mainly a question of geology

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

and, in the same way, recourse must be had to marine biology in order to know whether certain living resources belong to the sea-bed of these areas or to the superjacent waters. This role of the technical and scientific aspect was brought out by the Caracas Conference when instructing the Specialized Conference to study the problems "in the light of present-day scientific knowledge".

The economic and social aspect

The economic and social aspect plays a no less important part. As we shall constantly see, needs and interests of this type are, in final analysis, the determining factor in shaping the new regime of the sea. As far as the regime of the submarine areas is concerned, it is this factor which has led to the recognition of the exclusive right of the coastal State to explore and exploit the natural resources of their sea-bed and subsoil. And in the case of the regime applying to the conservation of the living resources of the high seas, it was again this factor which revealed the "special interest" of the coastal State in maintaining the yield of the resources near its coasts, at the same time as it confirmed the legitimacy of the general interest in the use and conservation of those resources. Even the Rome Conference, despite its strictly technical and scientific character, could not avoid making a statement on this point when defining the objectives of conservation measures and programmes. And the International Law Commission, referring in its final report to the General Assembly to certain proposals which involved exclusive rights of exploitation in certain areas or of certain species in the high seas, stated that it refrained from expressing an opinion on them because, it lacked "the necessary competence in the scientific and economic domains to study these exceptional situations adequately". Whatever problem or right is involved, the part played by the economic and social aspect is clear. Indeed, what basis or validity could a legal system have which ignored economic and social needs? The technical and scientific aspect is fundamental and, in some cases, virtually essential, but the various economic and social interests involved in the use and conservation of the resources of the sea are of necessity the factors which in the long run determine what are the most suitable legal rules for the protection of those resources.

The legal aspect

Let us turn finally to the legal aspect. The use and conservation of the resources of the sea are activities subject to the rules of international law. Regardless of their immediate source, i.e., whether adopted unilaterally or agreed on by the States concerned, the validity of the rules always depends on the fundamental concepts and principles of the legal regime of the sea. At the beginning of this Introduction, we drew

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

attention to the need to adpt the traditional concept of these principles to the new state of affairs created by advances in technique. The most outstanding features in the evolution of law through which this task of revision is being performed are undoubtedly the various extensions of State competence over areas of the sea where the rule of free use and exploitation of its wealth traditionally prevailed. Naturally, the problem is not only to decide which of these extensions of competence are legitimate and why their recognition is justified but also to define the conditions and limitations to which the exercise of such competence is subject. Since the areas affected by the new rights of the coastal State preserve their status as parts of the high seas, it will be equally important to establish effective safeguards for the rights traditionally enjoyed, and still enjoyed, by other States under the principle of the freedom of the seas. Hence, it is not merely a question of recognising the new competences of the coastal State, but also of effectively safeguarding the rights of third parties against the undue exercise or abuse of such competences.

Plan of this study

The method and plan adopted in this study is based on the foregoing considerations. In the chapter which follows we shall consider the legal regime of the sea in general and the various extensions of State competence in so far as they have bearing on the use or conservation of the resources of the sea. The two subsequent chapters concentrate on the problems set respectively by the right of the coastal State to explore and exploit the submarine areas adjacent to its territory and by the conservation of the living resources of the High seas. In the last chapter, we shall analyse the questions and problems as a whole with a view to formulating the objective conclusions emerging from the marked development now being undergone by the international law of the sea.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

CHAPTER II

THE REGIME OF THE SEA AND THE NEW EXTENSIONS OF STATE COMPETENCE

The regime governing the use and conservation of the resources of the sea depends on the juridical nature of the area of sea which they are to be found. As already stated in the Introduction, traditional international law recognized two areas only in this connexion: the territorial sea (together with the internal waters and seas) and the high seas or open sea. As has also been pointed out, the development of technique and its economic and social repercussions have led to new extensions of State competence over zones hitherto governed solely by regime of the high seas. The object of this chapter is to study the juridical nature of the various subdivisions of the sea to which these new extensions of State competence have given birth. Until the beginning of the century, at least, a general consensus prevailed as to the breadth of the territorial sea, but the position is now changed, owing to the growth of a marked lack of uniformity in practice on this point. In view of the nature of the rights which the coastal State can exercise in this area of the sea, it is most important to see what form the question takes in present-day international law. However, neither this question nor the others raised by the new extensions of State competence can be considered independently of the general legal system governing the sea. We shall accordingly first study the history of the the two traditional areas of the sea and, in particular, of the principle of the freedom of the seas.

4. HOW THE SEA CAME TO BE DIVIDED INTO DIFFERENT AREAS

The Regime of the Sea in Antiquity: Concepts of the Roman jurists.

The true antecedents of the regime of the sea, at least as understood in modern international law, are not, strictly speaking, to be found in ancient times. As pointed out by Bustamante, the peoples of the ancient world, Greece and Rome not excepted, made the sea their own by force whenever it served their political or economic ends and so long as no one stronger than they came to rule it in their stead, and when they roamed the seas, to the extent that the vessels of those times permitted, they sailed over them as they marched over the land within their reach in the firm belief that they were theirs because nobody was able to challenge them. Whatever benefit they might reap from the sea, from fish to flotsam and jetsam, was taken to be a consequence of the power of the State, and no one seemed to think otherwise.[1] This view of the position appears to be

---

1. El Mar Territorial (Habana, Imprenta de la Universidad,1930) p.14.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

generally shared by the authors who approach the subject from the standpoint of claims on the sea made at a much later date and even by those who have stayed to consider it in the light of the acts and claims of the peoples and rulers of the Middle East, Levant and Greece in ancient times. As one of the latter puts it, there is no evidence of a recognition of a legal concept of maritime dominion.[2] Hence, the history of international relations in Antiquity, as far as the sea is concerned, yields no more than facts and ideas indicative of the political state of affairs prevailing at the time and contributes nothing of importance to the juridical conception of the areas of the sea.

This fact is also confirmed by the way in which the jurists of Ancient Rome conceived of rights over the sea. Gaius described the sea as res nullius asserting that it belonged to the first occupant. Celsus enunciated the thesis of the free use of the sea: maris communem usum omnibus hominibus. Justinian, taking over this thesis, formulated in his Institutes the principle that the sea and its shores rank among the things common to all men, that the sea is open to public use and is nobody's property. However, as Raestad[3], among others, has observed, these concepts and principles were part of the jus gentium and, as such, laid down rights and obligations of a private nature. For that reason, they had no international efficacy, being conceived for the sole purpose of defining the legal status of property as between subjects of jus gentium. Indeed it could hardly have been otherwise, especially at the time when Rome was at the peak of its power and subjected all the peoples on the shores of the Mediterranean to its imperial rule. The concept of Mare Nostrum, in fact, ruled out all idea of the free use of the sea by peoples outside the Empire, since it involved the opposite idea of territorial sovereignty over the entire sea.

The earliest claims in the Middle Ages and the private law character thereof

This same concept likewise ruled out all idea of a belt of sea over which the coastal State might exercise sovereign power, since this other institution of the international law of the sea necessarily implies that there is a limit beyond which such

---

2. Potter, P.B. The Freedom of the Seas in History, Law and Politics, (New York, 1924), p. 16

3. La Mer Territoriale (Paris, 1913) p. 1 et seq.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

an extension of State sovereignty is no longer valid. The idea of this kind of marine area does not emerge until much later when certain medieval sovereigns and cities began to lay claim for specific purposes on certain parts of the sea adjacent to their territories. The first recorded antecedent is the claim to the rights of fishing and salt extraction made by Byzantium under the Emperor Leo (889-911 A.D.). According to this deliberate departure from the principle of free use of the sea as laid down in the Institutes, the owner of the shore enjoyed sole right of fishing and salt extraction for a certain distance from the shore. Centuries later, new claims were made, also with reference to the resources of the sea. In 1432, Eric, King of Denmark and Norway, maintained against the King of England that foreigners had never been allowed to fish in Norwegian waters without special permission. According to Norwegian law, the owner of the natural sea frontier was at the same time owner of the sea bed and nearby sea up to the line at which the great depths begin. Old English law likewise accorded the coastal owner exclusive usufruct of the parts of the coast where he was accustomed to fix his gear for sedentary fishing.[4]

It is to be noted, however, that the special nature and extent of these claims prevent them too from being regarded as true definitions of the area of sea later recognized in modern international law as the "territorial sea". While they involved the exclusion of foreigners from a particular stretch of sea contiguous to the coast and, in that sense, unlike the principle enunciated by the Roman jurists, had an undoubted international bearing, they nonetheless bore the same stamp of provisions of private law in as far as the exclusive right to use and exploit the resources of the sea was claimed for coastal owners, i.e. individuals, and not the subjects of the State in general. What, then, were the earliest claims genuinely involving such national interests or interests of the body politic in general with respect to fishing or some other activity? According to the historians of the international law of the sea, the first claims of this kind were those made from the thirteenth century onwards by some political entities and sovereigns of medieval Europe.

Later claims and their public character

The Republic of Venice began the movement by adopting public health regulations subjecting all ships coming from the Levant to a fortnight's insolation. Later, other cities, such as Genoa (1467), Mallorca (1471) and Marseilles (1476)[5], established similar quarantine systems to combat the plague, cholera and yellow fever. But other measures constituting a far greater extension of State power were also taken. Venice claimed dominion over the Adriatic and even managed, before the decadence of the regime of the Doges, to win from other sovereigns

---

4. Cf., Imbert Latour, J., La Mer Territoriale (Paris 1889), p. 129; Fulton, T.W., The Sovereignty of the Sea (Edingurgh and London, 1911), Section I, Chapter II, and Raestad, op cit., pp. 11-12 and 150-151.

5. Cf. Imbert Latour, loc.cit.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

formal recognition of her claim in treaties. Denmark declared its own the Baltic straits of the Sund and the Belt, and even the Baltic itself, and for a long time succeeded in levying dues for passage through the Belt. At one time, it went as far as to claim dominion over all the sea between the coasts of Norway and of Iceland and Greenland. But, the most sweeping claim, of course, was that made by Spain and Portugal in the Treaty of Tordecillas of 1494, based on Pope Alexander VI's Bull Inter caetera issued the year before, under both of which the land and the sea that had been, or might be, discovered was partitioned between the two countries according to whether it lay to the east or west of a straight line drawn a hundred leagues from the Cape Verde Islands[6].

Development and influence of doctrine: the theories of Mare Liberum and of Mare Clausum

It is of particular interest to note the attitude of the jurists of the time towards these maritime extensions of State power owing to the pronounced influence it had on the formation of international law on the subject. The jurists of the fourteenth and fifteenth centuries, echoing the claims of their epoch, not only accepted the considerable distances sometimes claimed but also laid the theoretical foundations of the concept of the "territorial sea". The most famous and influential member of this group was Bartolo de Saxoferrato (1319 - 1357), who maintained that the coastal State necessarily exercise jurisdcition over the sea and, a fortiori, over the islands in it, for a distance equal to two days sailing or in other words, a hundred miles. According to Raestad, this distance was accepted by the majority of jurists in the fifteenth century, the only dissentients being Angelo de Perusio, who extended jurisdiction to any part of the sea not in the immediate neighbourhood of another country and Guillermo de Perno, who preferred a distance of as far as the eye can reach, an idea apparently introduced by the Norman founders of the Kingdom of the two Sicilies.[7] It was this fact that led one author recently to affirm that the Middle Ages first witnessed the discussion and acceptance of the concept of the territorial sea and the transition from the idea of individual property to the right of sovereignty of the coastal city.[8]

In the same way, the sixteenth and seventeenth centuries saw the emergence and establishment of the idea of the other area

---

6. Cf., Gidel, Le Droit International Public de la Mer, Paris 1934, vol. I, pp. 130-133, and Raestad, op cit., pp.55 et seq.

7. Op.cit., p. 17. See also Bustamante, op.cit. pp. 45-46

8. Mateesco, N. Vers un Nouveau Droit International de la Mer (Paris, 1950), pp. 16-17.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

of the sea, the "high seas", the concept of which was implicit in the principle of the "freedom of the seas" enunciated in opposition to the exaggerated pretensions to maritime sovereignty already mentioned. Although the principle became established as a result of the famous polemic around the ideas of Mare Liberum and Mare Clausum, it was first formulated much earlier, manely in the doctrine of the Spanish jurists and theologians of the sixteenth century, in particular Francisco Alfonso de Castro, Fernando Vázquez de Menchaca and Francisco de Vitoria. The latter, in his Relectio de Indis, challenged the right of the Popes to grant maritime privileges to certain peoples in a way contrary to the jus communicationis. Vázquez de Menchaca, like Castro, denied the legal validity of the claims not only of Venice and Genoa but of Portugal and Spain as well. According to him, it was contrary to natural law and the elemental principles govern ing international relations to turn the sea and its waters into the private property of a nation. The common use of the sea,he added, was of prejudice to no one, since there was no prohibition against it. Other well-know jurists, including Donnellus and Gentilis, also revived this idea of the Roman jus gentium, making it truly international in character and effect. But the most striking note in this period is struck by the reply of Queen Elizabeth of England to the protests of the Spanish Ambassador Mendoza against the passage of Drake's ships through the seas reserved for Spain under the Papal Bull already mentioned. "The use of the sea and air is common to all", declared the Queen, "Neither can a title to the ocean belong to any people or private persons forasmuch as neither nature nor public use and custom permitteth any possession thereof".[9]

Finally, let us see the polemic aroused by the Mare Liberum thesis defended by Hugo Grotius and the Mare Clausum thesis upheld by John Selden. It all began with the publication in 1609 of chapter XII of a so far unpublished work (De Jure Praedae) written by Grotius at the request of the Dutch East Indies Company to refute the Portuguese claims which were being pressed at that time by Spain as the legal successor to the rights claimed by Portugal. In this work, as we shall see in the next section, the principle of the freedom of the seas was formulated and developed in a hitherto unknown form. But as the defence of this principle equally affected the claims of King James 1 of England to fishing rights in "British seas", various English jurists violently attacked Grotius' thesis in a series of publications. In the one that achieved fame, the Mare Clausum sive Dominio Maris (1936), Selden defended th British claims, asserting the right of the State to exercise its sovereignty over the seas adjacent to its territory.[10]

---

9. Cf. Potter, op.cit., pp.51-55; Gidel, op.cit., pp.139-140; and Higgins and Colombos, The International Law of the Sea, 2nd., 1951, pp. 16-17.

10. Cf. Francois, J.P.A., Report on the High Seas (United Nations, Doc. 4/CN.4/17), p.4; Gidel, op.cit., pp.141 et seq.; and Potter, op.cit., Chapter IV.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Definition and acceptance of the various sub-divisions of the sea

Although jurists and sovereigns continued to debate the question even after this historic polemic, by the close of the seventeenth century the two fundamental notions which were to dominate the international law of the sea until relatively recent times, that of the high seas and that of the territorial sea or waters subject to the territorial sovereignty of the coastal State, had already emerged as fairly well defined concepts. The conflict between the Mare Liberum theory and the theory of Mare Clausum ceased once it was realized that the two notions were neither incompatible from the legal point of view nor irreconcilable from the practical standpoint, but perfectly able to exist side both in law and in practice because neither excluded the other. The first, as we have seen, won itself a place when the exaggerated and at times unbounded pretensions of certain States were rejected. But, paradoxical as it may seem, it was consolidated and confirmed when the right of the coastal State was recognized to extend its sovereignty to the belt of sea fringing its coasts, for this right implies the idea of the "anti-sovereignty of the sea" beyond that limit. The reason for emphasizing this term is that, while it conveys the idea on which the traditional concept of the principle of freedom of the seas was really based, when this principle is viewed from the standpoint of the present state of development of international law, it may perhaps be no longer possible to continue to conceive it in the light of the same idea.

Before turning to the regime of the high seas and the territorial sea, we should add that it was also in the seventeenth century that the notion began to develop of other areas of the sea, some of which were clearly defined when the Conference for the Codification of International Law was convened by the League of Nations at The Hague in 1930. By that time it was possible for the French representative (Gidel) to speak of the following four categories: "Inland waters, territorial waters, adjacent waters, the high sea", a classification which was drawn from the Bases of Discussion drafted by the Preparatory Committee of the Conference and which the Conference accepted as this basis for its deliberations.[11] These various sub-divisions of the sea have persisted since the Conference of The Hague, but others, involving new extensions of State competence, have also emerged. All these will be considered in the course of this chapter in order to discover the true juridical nature of each.

5. THE HIGH SEAS AND THE PRINCIPLE OF THE FREEDOM OF THE SEAS

The recognition of the compatibility of the Mare Liberum and the Mare Clausum was not of course enough to solve all the

---

11. Cf., League of Nations, Acts of the Conference for the Codification of International Law, Vol.III, Minutes of the Second Committee, Territorial Waters, Off.No.C.351(b).1930. V.pp. 12 and 32.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

legal questions raised by the existence of these two sea areas, much less all the problems set by their physical co-existence. Some of these questions have a direct bearing on this study in as far as the juridical system applying to the use and conservation of the resources of the sea depends on the answer given to them. For example, the true juridical nature of the high seas or open sea will have to be determined in order to know what rights States can exercise therein. In other words, the juridical status of this area will have to be defined in order to discover the meaning and scope of the principle of the freedom of the (high) seas which governs it. As will be seen later, certain restrictive interpretations placed on the principle in recent times have shown how important it is to consider and settle these two questions, especially the second.

Juridical nature of the high seas

In connexion with the juridical nature of the high seas, the question was debated in ancient times as to whether they had the status of res nullius, i.e., whether they came among the things that belonged to no one, or whether they came in the category of res communis, or things common to all. From Grotius and his predecessors until a fairly recent date, the latter view predominated, as it was argued that if the high seas were res nullius, they could be acquired by occupation, which was impossible because their very nature rendered them incapable of effective occupation and because, even if that were not so, no State had the right to appropriate the high seas.[12] This question was debated at the 1925 session of the Institute of International Law at The Hague and although no agreement was reached, the great majority of its members declared in favour of the thesis that the high seas come in the category of res communis.[13] This view of the high seas has since undergone a change which does not appear to affect the fundamental idea on which it has always reposed, although some believe that in fact a new concept has been envolved. We have in mind the opinion that the high seas neither lend themselves to appropriation by any State nor "belong" to the international community, because the thing to which all States really have an equal right is the use of the high seas.[14]

---

12. See the authors quoted by Bustamante, Derecho Internacional Público, Havana, 1938, Vol. I, pp. 432-433

13. Cf. Annuaire de l'Institut de Droit International, 1925, Vol. 32, pp. 518-530

14. Cf., Fauchille, Droit International Public (Paris, 1921-1926), Part. II, pp. 50. See also Bustamante, op. cit. p. 434 and François, loc. cit., pp. 1-2.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

As can be seen, this is, in substance, the same traditional conception, only expressed in terms of the right of use enjoyed by States in this area of the sea.

The high seas as a means of communication and source of wealth

At all events, there is no doubt that when the high seas are viewed in this fashion, the principle of the freedom of the seas is much easier to formulate. For the main feature of this approach is not the pure and simple concept of community of property or condominium, which contains elements and possesses legal implications foreign to the concept of the high seas, but rather the idea of the right of use that all States may exercise outside the limits of the area of sea reserved for each of them. With such an approach, all that is needed is to settle the exact meaning of the right. Now the principle of the freedom of the seas has always been conceived in terms of the twin purposes served by the sea; as a means of communication and as a source of wealth. Hence, it is not surprising that the principle since first formulated has always been regarded as applying both to navigation and trade and to the use an exploitation of the natural resources of the sea. For Grotius, for example, the high sea "is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries.[15]

The meaning of the principle of the freedom of the seas

Since then, the idea of the sea as a means of communication and a source of wealth has been dominant in the doctrine and practice of international law. All but a few authors mention the freedom of navigation and freedom to fish as the two great freedoms of the sea.[16] For them the principle that the high

---

15. The Freedom of the Seas (published by the Carnegie endowment for International Peace, 1916), Chapter V.

16. See, inter alia, Diena, J., Diritto Internazionale Pubblico (3rd ed., 1930), p. 282; Balladore Palliere, G., Diritto Internazionale Pubblico (6th ed., Ripatta, Milan, 1952), p. 353; Ruiz Moreno, Derecho Internacional Público (Buenos Aires, 1940), I., p. 49; Podestá Costa, L., Manual de Derecho Internacional Público, 2nd edition (Buenos Aires), 1947, p. 102; Accioly, H., Tratado de Derecho Internacional Público (Río de Janeiro, 1946), Vol.II, p.78; Sibert, M., Traité de droit international public (Paris, 1951), Vol.I, p.668; Redslob, R., Traité de droit de gens (Paris, 1950), p. 170; Kelsen, H., Principles of International Law (New York, 1952), p. 224; Verdross, A., Völkerrecht , (Vienna, 1955), p. 232.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

seas is common property, or something which all States have the same right to use and exploit, covers any form of use or exploitation to which this area of the sea lends itself.[17] The status of the resources of the high sea as res communis and the right of the nationals of all States to use them has also been confirmed in two well-known international arbitration awards. In one of these rendered at Paris in 1893 in the Behring Sea Fur Seals dispute between England and the United States, to which we shall have occasion to refer again in this chapter, the Court denied "any right of protection or property... when such seals are outside the ordinary three-mile limit."[18] The other arbitral award was rendered in the North Atlantic Fisheries case (1901), when the Permanent Court of Arbitration of The Hague stated that "although a State cannot grant rights on the high seas it certainly can abandon the exercise of its right to fish on the high seas within certain definite limits."[19] Finally, it should be recalled that the Conference for the Codification of International Law held under the auspices of the League of Nations at The Hague in 1930 explicitly referred to the resources of the sea as a "common patrimony".[20]

There are naturally other consideration tending to confirm the assertion that the principle of the freedom of the seas entails the right to use its resources. The fact that the claims of the maritime powers, at the time when it was their practice to claim vast areas of sea, in many cases extended to fishing, makes it quite understandable that, when the practice disappeared and the regime of the two sea areas came to be defined, the freedom of the high seas should become applicable

---

17. The principle of the freedom of the seas likewise covers the right to lay submarine cables and pipelines and to fly over the high seas, together with other rights and freedom which have no bearing on the subject of this study. On the general content of the principle, see, apart from the authors mentioned in the previous footnote, the Report of the International Law Commission covering the Work of its Eighth session (23 April - 4 July 1956, General Assembly, Official Records, Eleventh session, Supplement no.9 (A/3159), Article 27 and Commentary.

18. On this arbitral award see pages ... below.

19. Cf. The Hague Court Reports, edited by J.B.Scott, New York, 1916, p. 182. See also the "individual opinion" of Luis Drago on question 5, ibid.

20. See Recommendation concerning the Protection of Fisheries, League of Nations Conference for the Codification of International Law, The Hague, March-April 1930, Final Act, p. 17.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

both to navigation and to the use and exploitation of their resources. In the same way the fact that the right of fishing is recognized, as it was in ancient times, as included in the exclusive rights enjoyed by the coastal State in its territorial sea clearly indicates that fishing is regarded and has always been regarded as free for the nationals of the other States outside that zone. The assertion is also confirmed by the system of international co-operation which has become established practice in the field of conservation of the living resources of the high seas, i.e., by the fact that the measures taken to this end do not depend on the unilateral action of any State but on the concerted action of all those concerned.

Basis of the freedom of fishing

But what has been the basis of the freedom of fishing? Or, to put it another way, why has the right of all States to the use of the resources of the high seas been recognized? Grotius, in the passage previously quoted, maintained that nothing which could be used without prejudice to anyone, by reason of its being "inexhaustible", was liable to appropriation. This theory of the "inexhaustibility" of the resources of the sea, in conjunction with the idea that the sea, by reason of its physical nature, did not lend itself to effective occupation and possession, was for a long time used to justify the legal status accorded to the resources in question. As Foignet, to quote only one of many, put it, there is nothing to be gained by monopolizing an inexhaustible asset, which is constantly renewed, of which all stand in equal need and which each can use without reducing the other's share.[21]

There is no longer any question of this theory of the "inexhaustibility" of the resources of the sea serving as a basis for the free use of them to-day. If the raison d'être of this freedom were based on such a theory, what would happen when it was discovered that some or all of these resources were exhaustible, or subject to a considerable decline in yield if certain means and methods of exploiting them were used? As will be seen later, this freedom is no longer conceived in terms of a right of absolute and unlimited use, as was once traditional. In other words, though the theory that the resources of the sea are by their very nature inexhaustible might serve to explain and justify the unrestricted exercise of the freedom to use them, the present state of development of technique and other economic and social factors render it invalid. What is then the true basis of this freedom? Simply, as was recognized in ancient times, the status of res communis, of being a "common patrimony", to use the expression of the Conference of The Hague, which the resources of the (high) seas have always enjoyed. Just as this immense expanse of sea may

---

21. Manuel Elémentaire de Droit International Public (Paris, 1923), pp.106-107

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

be used by all States as a channel of communication, nobody being allowed to prevent or impede the free passage of all flags, so likewise the nationals of any State may use and exploit its resources without any one having the right to forbid it to do so or put obstacles in its way. And this freedom would no be affected in its essentials by any conditions or restrictions that the technical, economic and social factors at work in contemporary life may impose on this right of use and exploitation.

6. THE TERRITORIAL SEA: ITS JURIDICAL STATUS, BREADTH AND DELIMITATION

The idea of exclusiveness attaching to the territorial sea

As we have seen when considering the historical background to the areas into which the sea is sub-divided, by the end of the Middle Ages the concept of the territorial sea was already being discussed and accepted in the sense of a right possessed by the coastal city or State. However, since then and until a fairly recent date, theorists have not always held the same conception of this right nor has the existence of a clearly defined concept of this area of the sea always been evident in practice. Undoubtedly the territorial sea has at all times been associated by the majority with the idea of exclusiveness to the benefit of the coastal State, subject to the limitations acknowledged as necessary in order to safeguard other interests and rights of the other States, and only few have held that the whole sea must be regarde as free without prejudice to the recognition of specific interests and special rights of the coasts. But even within the dominant current of opinion, there has been much debate as to whether this idea of exclusivenses derives from a right of property, sovereignty, dominion, imperium, or jurisdiction.[22] And the same indecision is evident in practice, as can be seen from the various ways in which States have proclaimed their rights in this area of the sea in their constitutions or laws or from the different character attributed to this area in the international treaties that refer to it.

Nowadays the question is rendered largely academic by the fact that, whatever the terms used, the situation remains fundamentally the same, the rights of the coastal State in its territorial sea being analoguous to those it exercises in the part of its territory on dry land. Whether the rights are derived from the legal concepts mentioned, which is as much as to say that they owe their origin to them, is a problem of

---

22. For the different theories advanced in an endeavour to define the juridical nature of the territorial sea, see Fauchille, op.cit., pp. 131 and 157 and Bustamante, El Mar Territorial, chap. IV

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

strictly minor importance. The really important thing is their essential nature, i.e. the idea of exclusiveness which characterizes them. This idea was taken up and expressed by the Second Committee of the Codification Conference of The Hague through its use of the term "sovereignty" in article 1 of its draft. In the observations on the article in its report, the Sub-Committee explains that "the idea which it has been sought to express by stating that the belt of territorial sea forms part of the territory of the State is that the power exercised by the State over this belt is in its nature no different from the power which the State exercises over its domain on land. This is also the reason why term "sovereignty" has been retained, a term which better than any other describes the juridical nature of this power."[23] And the International Law Commission, reflecting the view which has finally prevailed on the subject, states, when defining the "juridical status of the territorial sea" in article 1 of its draft, that "The sovereignty of a State extends to a belt of sea adjacent to its coasts...." Naturally, in both drafts, this sovereign right of the coastal State is made subject to certain limitations imposed by international law.[24]

Juridical status of the natural resources of this area of the sea

Of particular relevance to the subject of this study is the question, which has sometimes been raised, of what is the legal status of the natural resources of the territorial sea. The Report on Territorial Waters submitted by Dr. Schücking to the League of Nations Committee of Experts for the Progressive codification of International Law expresses the following view: "In virtue of its right of dominion over the whole area of its territorial waters, the riparian State possesses for itself and for its nationals the sole right of ownership over the riches of the sea. This right covers the fauna found in the waters and also everything that may be found above or below the subsoil of the territorial sea..."[25] This concept of the right of the coastal State over the resources of the sea which "are to be found" in its territorial sea is no more than the logical consequence of the idea of exclusiveness that dominates and distinguishes this area of the sea. However, the concept does not always fit the facts. The resources in question, except those in the subsoil and those permanently attached to the bottom of the sea, can migrate outside the territorial sea. Whenever

---

23. Cf. Doc. referred to in footnote 11, p. 202

24. See the Commission's Report, referred to in footnote 17.

25. League of Nations, Committee of Experts for the Progressive Codification of International Law, Off, No. C.196. M.70. 1927. V. p. 53.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

this happens, as it fairly, often does, the concept of ownership ceases to apply, as the resources are the governed by the regime of the high seas.[26] For this reason, since the coastal State can reserve the resources for itself or its nationals as long as those resources "are to be found" in its territorial sea, the concept of sovereignty is still to be preferred; for what the State really possesses, in fact, is an exclusive right of use and exploitation.

Various questions involved in the problem of the breadth of the territorial sea

The question of the breadth of the territorial sea is much more complex because of the various aspects of it that must be taken into account in order to settle it properly. For the moment, we shall do no more than mention these aspects or at least the more important of them to facilitate the more extensive study we shall be making of the problem in the next two sections. The first, of course, is whether or not this area of the sea has a fixed breadth under international law. This aspect of the question has acquired some importance of late not only through the marked lack of uniformity in practice on this point but also because of the increasingly frequent assertion that no rule of international law exists on the subject. Another aspect closely related to the first in whether the determination of the breadth of the territorial sea is a matter for international law or whether it belongs to the category of questions within the sovereignty or exclusive competence of the coastal State. Here, as can be seen, the question is no longer whether any rule of international law fixing the breadth of this belt exists but of whether this is a problem amenable to solution by this body of law or, at all events, whether action taken by the coastal State in such a connexion is subject to conditions and restrictions established by international law.

Unless it is maintained that the coastal State can fix the breadth of its territorial sea untrammeled by any conditions or limitations whatsoever, which is something that has never been claimed or at least not in those terms, then whatever answer is given to the above-mentioned questions, there will always be others that remain to be answered, some of which are, or in certain circumstances may be, of equal importance. For example, in view of the fact that the territorial sea is a source not only of rights for the coastal State but also of certain obligations and responsabilities, should the ability or qualifications of the coastal State in question to assume

---

26. See in this connexion, inter alias, Wilson and John Fisher Williams, "Les fondements juridiques de la conservation des richesses de la mer" Annuaire de l'Institut de Droit International (1936), vol. 39, p. 368, and Houton, M.W., The Continental Shelf, The Hague, 1952, p. 100

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

those obligations and responsibilities be taken into account when fixing the breadth of this area of the sea? Another question not to be overlooked and which has been much debated in recent times may be summed up as follows: If the traditional minimum breadth of three miles is considered inadequate at the present day, on what criterion or criteria can the coastal State base its claim to extend its territorial sea beyond that limit? In this connexion apart from the classic criterion of effective exercise usually invoked, there is an increasing tendency to place more and more stress on geographical (and sometimes geological) factors, the biological conditions of the maritime zone adjacent to the territory of the State and the economic and social needs and interests of its population. Another question that arises is whether, on the same assumtion, an identical breadth common to all maritime States should be agreed or whether it would be preferable and justified to accept the possibility of various limits established in the light of the factors and needs peculiar to each State or of those characteristic of a particular region.

There are further aspects to the question. One which has attracted considerable attention of late is whether, assuming the three-mile limit to be now inadequate, the coastal State can extend its territorial sea as far as necessary, or whether there must be an extreme limit established independently of the criteria justifying the particular breadth. Another aspect of the problem, which has not been taken much into account although constantly cropping up in practice, is whether the State can fix one limit to its territorial sea for particular purposes and another or other limits for other purposes. This leads to the question whether the territorial sea is an indivisible legal concept or whether one must think in terms of a sort of plurality of territorial seas all relating to one and the same State. Finally, the question of the breadth of the territorial sea, particularly in recent years, appears to be intimately connected with the other extensions of State competence. As we shall point out later, the question of recognition of new rights of the coastal State in zones previously part of the high seas is bound to turn on the decision taken with respect to the breadth of this area of sea.

Systems for the delimitation of the territorial sea

The system adopted for delimiting the territorial sea may also affect the regime governing the use and conservation of the resources of the sea. Usually the breadth of the territorial sea is measured from the low-water mark along the coast, but when the coast is very irregular or fringed with islands and shoals, or when the territory of a country takes the form of an archipelago, a different system has to be adopted. This, as will be seen later, consists in taking as the landward limit of the territorial sea straight lines drawn between coastal landmarks and lines drawn between any islands or shoals, and from them to the coast. Just as in the case of bays, the stretches of sea between such lines and the coast acquire the status of "internal waters". As pointed out in the Introduction, the adoption of this system enables broad stretches of sea, hitherto

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

part of the high seas, to be transformed into "internal waters" of the coastal State, with all the implications which that may have from the standpoint of the use and exploitation of the resources to be found therein.

7. THE RULE OF THE MARINE LEAGUE AND THE CODIFICATION CONFERENCE AT THE HAGUE (1930)

The general consensus in favour of the three-mile limit

While it is in no way incorrect to say that there has never been absolute uniformity either in doctrine or in practice with regard to the breadth of the territorial sea, it cannot be denied that for some time there was a general consensus as to the breadth of this belt of sea. Hence it can be justly claimed that traditional international law recognized the rule of the marine league, i.e. the limit of three nautical miles. Before describing the present situation, however, let us briefly see how rule started and developed.

Hugo Grotius in his De Jure Belli ac Pacis, laid down the doctrine that the sea could be subject to imperium to the extent that, or so long as, effective dominion could be exercised over it.[27] From this doctrine appears to have been derived the later idea that the maritime dominion of the State should be measured by the range of a cannon firing from the shore. As Bynkershoek puts it, "imperium terrae finiri ubi finitur armorum potestas".[28] In the eighteenth century the range of a cannon was approximately three nautical miles, but, as Higgins and Colombos have pointed out, this assimilation of the cannon-shot limit to the three-mile distance of territorial waters persisted long after the science of ordnance had considerably extended the range of guns.[29] How, then, did the marine league rule come to be generalized despite this development and precisely after it had occurred? Professor Jessup has maintained that "had it not been for their insistence (i.e. of Great Britain and the United States), it is

---

27. Lib. ii, c. iii, s. xiii (2).

28. Questiones Juris Publici, lib. i, c. viii.

29. Op. cit., p. 66.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

quite possible that this rule would not now be established in international law".[30] However, independently of this consideration and of the technical development mentioned above, let us see how the general consensus in favour of the three-mile limit came into being.

In its Customs Consolidation Act of 1876, the United Kingdom established the limit of a nautical league for the execution of all provisions applying to foreign vessels. In repealing previous statutes establishing special jurisdiction over greater distances, the United Kingdom Government described this measure as an "Act, by which British municipal legislation was made to conform with international law". The new rule was later upheld in several British court judgements.[31] In the case of the United States, the three-mile limit was adopted during the first few years of its independent existence. The statesmen of the new State at first entertained certain reservations regarding the adoption of the marine league rule until Congress in 1794 introduced it into its domestic legislation by fixing the limit of maritime jurisdiction of District Courts at three miles. From then on, the United States, like the United Kingdom, upheld the rule in court judgements and in government acts and declarations.[32] During the nineteenth and early part of this century many States in all continents and in almost all regions of the world adhered to the three-mile rule, either incorporating it in their laws or proclaiming it vis-à-vis other States. Such was the case, for instance, of Japan in Asia; of Germany, France, the Netherlands and Belgium in Europe, and of Argentina, Chile, Brazil and Cuba in Latin America.

During the same period the position of the three-mile rule was also consolidated by frequent acceptance in treaties and in awards of arbitral tribunals. The North Seas Fisheries Convention (1882), ratified by the United Kingdom, Germany, Belgium, Denmark, France and the Netherlands, established such a limit for the exclusive rights which the contracting parties could claim. The Suez Canal Convention, signed in Constantinople in 1888, established the same limit in determining the zones in which hostilities could be carried on. This Convention was framed by the United Kingdom, the Austro-Hungrian Empire, France, Germany, Italy, the Netherlands, Russia, Spain and Turkey. In the North Atlantic Fisheries Arbitration, (1910), although the court was not called upon to pronounce directly

---

30. The Law of Territorial Waters and Maritime Jurisdiction (New York, 1927), pag. 62.

31. Under the Territorial Waters Jurisdiction Act of 1878, Parliament made the Act of 1876 applicable to the British Dominions, cf. Higgins and Colombos op. cit. pp. 67.78.

32. Cf., Jessup, op.cit., pp. 49-60

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

on the question of the breadth of the territorial sea, its members, apart from the dissident voice of Dr. Drago, formated a majority opinion on the basis of the three-mile rule. Finally, the Central American Court of Justice, in a case between El Salvador and Nicaragua, expressed the opinion that, although the State could exercise "the right of empire for defensive and fiscal purposes" for a distance of three marine leagues (nine miles), it possessed absolute and exclusive jurisdiction only within the three-mile limit.[33]

Other limits proposed or established in practice

As was seen at the beginning of this section, there never has been absolute uniformity with respect to the three-mile limit or any other limit. From time immemoriaal the Scandinavian countries, invoking historic titles or rights, have fixed the limit at four miles.[34] Spain, Portugal and Uruguay, claiming a greater breadth for their territorial sea, have a long tradition of refusal to recognize the marine league rule as binding. Other States, such as Russia and Italy, have adopted the same or a similar position. International treaties and case law reveal a like state of affairs. In one of the Conventions signed at the Montevideo Congress (1889) by Argentina, Bolivia, Peru, Paraguay and Uruguay, for example, a five-mile limit was adopted for purposes of criminal jurisdiction, while in the Costa Rica Packet case (1897) between Great Britain and the Netherlands, the sole arbitrator, Mr. de Martens, expressed preference in his award for a ten-mile limit.[35] As far as doctrine is concerned, Jessup admitted that, at the time of publication of his book (1927), "a great weight of opinion distinguished jurists is opposed (to the rule)".[36] It was probably in view of this definite trend of informed opinion, and of the precedents just cited, that the Institute of International Law adopted a larger distance (six miles) at its Paris session in 1894.[37]

---

33. See Baty's article "The Three-Mile Limit", American Journal of International Law, (1928), Vol.22, pp. 417-532, which mentions practically all the international instruments and decisions in which the marine league rule is accepted.

34. On the historical antecedents of the Scandinavian position, see Kent, H.S.K., "The Historical Origins of the Three-Mile Limit", American Journal of International Law (1954), Vol.48, pp. 538 et seq.

35. Cf. Jessup, op.cit., pp.61 and 63; and Higgins and Colombos, op.cit., p. 72.

36. Op.cit., p.64. An English author of no less authority on the subject, Fulton, points out the same fact, remarking "but though it (i.e. three miles) is the ordinary limit, it is not the only one enforced, and it is national law have stated, that territorial jurisdiction cannot be carried further". Op.cit., pp. 663-664.

37. Cf. Annuaire, Vol. 13, p. 329. The Institute, reviewing

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Gradual abandonment of the marine league rule

Quite apart from this lack of uniformity in doctrine and practice, the marine league rule began, from the beginning of the century, to be gradually abandoned by the very States which had hitherto upheld it, thus making it obvious that the general consensus which had raised the three-mile limit to the level of a rule of international law was slowly but surely melting away. Admittedly, those major States which adopted a new attitude did not entirely abandon the traditional limit. In some cases they extended their territorial sea only for certain purposes: security, public health, Customs and excise, etc. In others, the extension was not even of the same type or no the same grounds but took the form of an additional maritime zone which would enable them to achieve the same or similar ends. But at all events there is no disputing enjoyed anything like the general acceptance of States. The first symptoms of the anarchy eventually to prevail on this subject in the international law of the sea had, in fact, already appeared.

Factors that prevented agreement at the Conference of the Hague

The Conference for the Codification of International Law held at the Hague in 1930 brought home with full force the radical change that had taken place in the attitude and practice of States with regard to the breadth of the territorial sea. This change, as the Conference itself acknowledged in so many words, was the main reason which prevented its reaching an agreement on the point. It was not only one, however. What considerably complicated the situation, in addition to the diversity of views advanced by delegations on the specific question of the limit of the territorial sea, was the fact that a certain number of delegations claimed recognition for specific purposes of a zone contiguous to the territorial waters, a concept which was not always clearly distinguishable from the traditional concept of the juridical status of the territorial sea. Since we shall be returning to this question of the "contiguous zones", it will suffice for the moment to stress the importance of this development, the full significance of which can be appreciated from the fact that the group of delegations defending this view consisted mainly of those who favoured the three-mile limit. This makes it all the easier to understand why the marine league rule, which commanded a majority over any of the other limits proposed, was not adopted by the Conference.

---

the question at its Stockolm session (1929), abandoned this position and accepted the marine league rule. Ibid., vol. 34, pp. 755.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

However, even though the Conference was unable to adopt any of the limits proposed, the procedure observed in the Committee that considered the subject revealed the "position in principle" of each delegation with regard to the breadth of the territorial sea. At the last meeting of the session all the delegations represented stated their views except the Soviete Union and Czechoslovakia. The result was as follows: twenty upheld the marine league rule (South Africa, Germany, United States, Belgium, Chile, Great Britain, Australia, Canada, China, Egypt, Esthonia, France, Greece, India, Irish Free State, Japan, he Netherlands, Poland, Finland and Denmark). Twelve declared in favour of the six-mile limit (Brazil, Cuba, Spain, Italy, Latvia, Persia, Portugal, Romania, Turkey, Uruguay and Yugoeslavia), while three claimed for themselves a four-mile limit (Norway, Sweden and Iceland). The delegations made many observations and reservations in defining their position. The Scandinavians, for instance, were not opposed to other countries adopting a different limit. Some of those who favoured the six-mile limit, made it conditional on the recognition of a "broader contiguous zone". The same reservation was formulated by most of the delegations who upheld the rule of the marine league. Only the British Commonwealth, the United States and Japan, opposed the recognition of this new field of maritime jurisdiction.[38]

8. SUBSEQUENT DEVELOPMENT OF PRACTICE AND PRESENT STATE OF THE QUESTION

After the Conference of the Hague the lack of uniformity in international practice with regard to the breadth of the territorial sea grew steadily more acute. This lack of uniformity is more evident when the various types of claim made by each State are viewed in conjunction than when one considers only those involving an extension of their territorial sea in the strict sense of the term. For most of these claims relate to extensions of State competence which are quite distinct both as to their juridical nature and as to their purpose. Since this point is of fundamental importance when considering, and seeking a solution to, the question of the breadth of the area of sea over which the State can exercise full competence, the claims made by States, more especially since the Conference of the Hague, are listed below to illustrate their extreme diversity.[39]

Table

Synoptic table of contemporary international practice

ALBANIA	6 miles

38. See the document referred to in footnote 11, pp.119-132.

39. The following data are taken primarily from the Second

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

ARGENTINA*	3 miles
Security	12 miles (1869)
Customs	12 miles (1869)
Fisheries	10 miles (1907); 12 miles (1943)
AUSTRALIA*	3 miles (Regime of the Commonwealth)
BELGIUM*	3 miles (1882)
Customs	10 kilometers (1852)
BRAZIL*	3 miles
Fisheries	12 miles (1930)
BULGARIA	12 miles (1951) (1935: 6 miles)
CAMBODIA	(Up to 16 December 1955: French Regime)
CANADA*	3 miles (Regime of the Commonwealth)
Customs	9 miles (1906)
Fisheries	12 miles (1927 and 1956)
CEYLON*	3 miles (Regime of the Commonwealth)
Customs	6 miles (1928)
Sedentary Fisheries	6 miles (1891)
CHILE*	3 miles
Security	100 kilometers (1948)
Customs	100 kilometers (1948)
CHINA	3 miles (Codification Conference of
Customs	12 miles (1934) (1930)

Report on the Regime of Territorial Sea submitted by Professor Francois, Special Rapporteur, to the UN International Law Commission (A/CN.4/61, 19 February 1953), pp.10-15, and from S. Whittemore Boggs, "National Claims in Adjacent Seas", The Geographical Review (1951), vol.XLI, No. 2, pp. 185-209

* See other claims relating to zones of exclusive exploitation of fishery conservation, of submarine areas and of superyacent waters thereof, in Sections 10 and 11 of this Chapter and Section 15 of next Chapter.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

COLOMBIA	6 miles (1930)
Fisheries	12 miles (1923)
Polution	12 miles (1923)
Customs	20 kilometers (1931)
COSTA RICA*	3 miles
CUBA*	3 miles
Customs	12 miles (1901)
Fisheries	3 miles (1934)
Polution	5 miles (1936)
Social Defense	3 miles (1942)
DENMARK	3 miles (Codification Conference);1812: 4 miles
Customs	3 miles (Codification Conference)
Fisheries	3 miles (Codification Conference)
DOMINICAN REPUBLIC*	3 miles
ECUADOR*	12 miles (1851)(1857:3 miles)
Security	12 miles (1857)
Customs	15 miles (1934/1938)
Fisheries	
EGYPT	12 miles (1951)
EL SALVADOR*	200 miles (1950)(1860:3 miles)
	12, 200 and over 200 (1955)
FINLAND	4 miles (1920)
Customs	6 miles (1839)
FRANCE	
Fisheries	3 miles (1928)
Neutrality	6 miles (1912)
Customs	20 kilometers (1948)
Security	3 to 6 miles (1934)
GERMANY	3 miles (1909)
GREECE	6 miles (1936)
Neutrality	6 miles (1914)
Security	10 miles (1913)
GUATEMALA*	12 miles (1940)
Customs	2 miles (1894)
HAITI	6 miles
HONDURAS*	12 kilometers (1936)

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

ICELAND*	
Fisheries	4 miles (1950)(1903:3 miles)
Customs	4 miles (1925/1953)
INDIA*	3 miles (Regime of the Common- 6 miles (1956) wealth)
INDONESIA	3 miles (Regime of Netherlands)
IRAN*	6 miles (1934)
Customs	12 miles (1934)
Security	12 miles (1934)
IRELAND	("According to international law")
ISRAEL*	6 miles (1955)
ITALY	6 miles (1914)
Customs	12 miles (1940)
Security:merchant ships	10 miles (1912; in time of peace)
JAPAN	3 miles (Conference of Codifica-
Neutrality	3 miles (1870) tion)
Polution	10 kilometers (1948)
JORDAN	3 miles (1943)
KOREA*	
LEBANON	6 miles (1921)
Fisheries	20 kilometers (1935)
Customs.	20 kilometers (1943)
Penal law	
LIBERIA	3 miles (1914)
LYBIA	6 miles
MEXICO*	9 miles
Fisheries	20 kilometers (1902)
Customs	20 kilometers (1941)
MOROCCO	
Fisheries	6 miles (1922)
NETHERLANDS	3 miles
NEW ZELAND	3 miles (Regime of the Com-monwealth)
NICARAGUA*	3 miles

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

NORWAY	7,408 meters (1812)(1 marine league:4 miles)
Fisheries	7,408 meters
Neutrality	7.408 meters
Customs	10 miles (1921)
PAKISTAN*	3 miles (Regime of the Commonwealth)
PANAMA*	3 miles
PERU*	3 miles (1934)
PHILIPPINES*	
POLAND	3 miles (1932)
Defense	6 miles (1932)
Customs	6 miles (1938)
PORTUGAL*	6 miles (1885/1927)
Customs	6 miles (1911/1941)
Fisheries	Reciprocity (1917)
ROMANIA	12 miles (1956;1934:6 miles)
SAUDI ARABIA*	6 miles (1949)
Security	12 miles (1949)
Customs	12 miles (1949)
SPAIN	
Customs	6 miles (1830/1928)
Neutrality	6 miles (1894)
Security	3 miles (1914)
Fisheries	6 miles (1913)
SWEDEN	4 miles (1938)
Neutrality	3 miles (1913)
Customs	4 miles (1927)
SYRIA	
Fisheries	6 miles (1921)
Customs	20 kilometers (1935)
THAILAND	3 miles
TURKEY	6 miles (1914)
Customs	30 to 60 kilometers (1949)
UNION OF SOUTH AFRICA	3 miles (Regime of the Commonwealth)

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

UNION OF SOVIET SOCIALIST REPUBLIC	12 miles (1909)
UNITED KINGDOM OF GREAT BRITAIN AND NOTHERN IRELAND	3 miles
UNITED STATES OF AMERICA*	3 miles
Customs	12 miles (1935)
CALIFORNIA	3 miles (1879)
FLORIDA	9 miles (1885)
LOUSIANA	27 miles (1938)
OREGON	3 miles (1959)
WASHINGTON	3 miles (1889)
URUGUAY	5 miles
VENEZUELA*	12 miles (1956)
Security	12 miles (1944)
Customs	12 miles (1944)
Interest protection	12 miles
Neutrality	3 miles (1939)
Sanitary regulation	12 miles (1939)
YUGOESLAVIA	6 miles (1948)
Customs	6 miles (1949)
Fisheries	10 miles (1951)

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

The ideas of "indivisibility" and "plurality" in the concept of the territorial sea

As can be seen, the lack of uniformity in international practice is primarily due to the variety of claims made by States and to the fact that it is not always possible to ascertain exactly what limit each attributes to its territorial sea in the strict sense of the term. This limit is linked, in particular, with the concept of the "contiguous zone" according to the interest which the State desires to safeguard (Customs and excise, public health, fishing, etc.) and to the breadth attributed to the latter. Sometimes the nature and purpose of this type of zone are stated in the declarations establishing it but quite often they are not. Similarly, the breadth of the territorial sea is sometimes fixed but on other occasions a particular breadth is claimed merely for a specific purpose. How, then, are we to judge and settle this problem? Can it be admitted in the cases just mentioned that the State in question has various "territorial seas"? In view of the fact that the territorial sea has always been understood, at least implicitly, as an indivisible juridical concept, i.e. as an area of sea in which the State can exercise its sovereignty for all, and not merely for one or two, purposes, the answer should be not. As will be seen later, therein lies precisely the fundamental difference between the juridical nature of the territorial sea and that of the "contiguous zone" and of the other extensions of State competence disclosed by a study of contemporary practice.

Is there an international rule fixing the breadth of the territorial sea?

At all events the concept of an indivisible territorial sea is the only one which permits of rational formulationa and solution of the question of its breadth, for to start from the view that a plurality of "territorial seas" is admissible would mean judging the question in the light of the different matters for which these various extensions of the sovereignty of the State over the sea fringing its coasts were established. We will accordingly take as our point of departure the "indivisibility" of the territorial sea and consider the first question mentioned in the previous section, namely, whether any definite breadth is fixed for this area of sea by international law or general practice accepted as law. The only conclusion to be drawn from and objective examination of the present position is that the general consensus that reigned for a certain time with respect to the marine league rule no longer exists, and that there is no consensus either on any of the other limits advanced in its place. A resolution adopted at the Third Meeting of the Inter-American Council of Jurists (Mexico City, 1956) referred to this question in the following terms: "The distance of three miles as the limit of territorial waters is insufficient, and does not constitute a general rule of international law. Therefore,

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

the enlargement of the zone of the sea traditionally called "territorial waters" is justifiable."[40] Apart from the question whether this limit is "insufficient" and whether its enlargement is "justifiable", a claim which would be tenable only if all or almost all States had abandoned the marine league rule, the Council's declaration reflects only one aspect of the actual state of affairs.[41] The International Law Commission of the United Nations summed it up more accurately. In an article adopted at its eight session (1956), the Commission recognised that "international practice is not uniform as regards the delimitation of the territorial sea" and "without taking any decision as to the breadth of the territorial sea" noted "on the one had, that many States have fixed a breadth greater than three miles and, on the other hand, that many States do not recognise such a breadth when that of their own territorial sea is less".[42]

Is it a matter for municipal or for international law?

Now, if not definite breadth is fixed at the present time for the territorial sea by international law (or general practice accepted as law), does that mean that the question comes under the exclusive sovereignty or competence of each coastal State, or is it still subject to international law? According to the resolution of the Inter-American Council of Jurists cited in the previous paragraph, "Each State is competent to

---

40. Cf. Final Act of the Third Meeting of the Inter-American Council of Jurists. Mexico City, D.F, Mexico, 17 January-4 February 1956 (Pan-American Union, Washington D.C.) resolution XIII.

41. The Inter-American Specialized Conference which met at Ciudad Trujillo a few weeks after the meeting of the Council formulated this other declaration "There exists a diversity of positions among the States represented at this Conference with respect to the breadth of the territorial sea". Cf. Final Act of the Inter-American Specialized Conference on "The Conservation of Natural Resources: Continental Shelf and Oceanic Waters" (Pan-American Union, Washington D.C.), Resolution of Ciudad Trujillo.

42. In its Report the Commission explains that "As regards the right to fix the limit between three and twelve miles, the Commission was obliged to note that international practice was far from uniform. Since several States have established a breadth of between three and twelve miles, while others are not prepared to recognize such extensions, the Commission was unable to take a decision on the subject, and expressed the opinion that the question should be decided by an international conference of plenipotentiaries." Cf. the Report of the Commission quoted in footnote(17), article 3 of the draft and paragraph (7) of the comentary.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

establish its territorial waters within reasonable limits, taking into account geographical, geological, and biological factors, as well as the economic needs of its population, and its security and defence." However, according to the opinion expressed by the International Court of Justice in the Fisheries Case (United Kingdom v. Norway)[43]:

> "The delimitation of sea areas always has an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act because only the coastal State is competent to take it, the validity of the delimitation with regard to other States depends upon international law."

The International Law Commission for its part, before taking the decision referred to above, had rejected the following proposal: "It is for each coastal State, in the exercise of its sovereign powers, to fix the breadth of its territorial sea."[44] This attitude of the Court and the Commission seems the only possible one to take in view of the nature and scope of the rights that the coastal State can exercise in the territorial sea and, hence, of the safeguards required to protect the interests and rights of the other States on the high seas.

Conditions determining the validity of an extension of the limit beyond three miles

Assuming the extension of the territorial sea beyond the three-mile limit to be neither incompatible with nor contrary to, international law (or to general practice accepted as law), what conditions or criteria have to be met or what limitations observed before this extension can be valid for other States? Judge Alvarez in his individual opinion on the Anglo-Norwegian case expressed certain ideas which shed considerable light on this point:[45]

> "1. Having regard to the great variety of the geographical and economic conditions of States, it is not possible to lay down uniform rules, applicable to all, governing the extent of the territorial sea and the way in which it is to be reckoned.

---

43. International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, Judgement of December 18th, 1951, p. 132.

44. See Summary Record of the 363rd meeting (A/CN.4/SR.363), p.19.

45. Cf. loc. cit., in footnote 43, p. 150.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

> 2. Each State may therefore determine the extent of its territorial sea and the way in which it is to be reckoned, provided it does so in a reasonable manner, that it is capable of exercising supervision over the zone in question and of carrying out the rights acquired by other States, that it does no harm to general interests and does not constitute an abus de droit.
>
> 7. Any State directly concerned may raise an objection to another State's decision as to the extent of its territorial sea or of the area beyond it, if it alleges that the conditions set out above for the determination of these areas have been violated. Disputes arising out of such objections must be resolved in accordance with the provisions of the Charter of the United Nations."

As the case of the Scandinavian countries shows, the classical title to a greater breadth than three miles is that of "historic rights". The geographical and economic factors referred to by Alvarez are also mentioned, alongside the geological and biological factors, in the resolution of the Inter-American Council of Jurists quoted above. The last two criteria have served as a basis for the claim that the breadth of the territorial sea must coincide with the limit of the continental shelf of the coastal State.[46] Strategical and security considerations have also been invoked for the same purpose of justifying abandonment of the marine league rule.[47]

Equal importance is attached to the conditions and limitations to be observed if the breadth fixed by the coastal State for its territorial sea is to be valid for third States. The classical test is that of "efficacy"; i.e. that the the State must not extend its territorial sea beyond the limit up to which it can exercise effective control and be capable of fulfilling the obligations placed on it by international law with regard to this area of sea.[48] Strict application of this principle would, of course, lead to an infinite variety of limits. In any case, apart from the position of inequality in which maritime States would thereby be placed, how would the degree of "effective control" of each coastal State be determined? On the basis of what criterion or with reference to be protection or supervision of what interests? It seems therefore simpler

---

46. See pages ..... and ... below.

47. See Survey of International Law (Memorandum submitted by the Secretary-General, A/CN.4/1,1/Rev.1) p. 43 and the report by Professor François referred to in footnote 39,p.27

48. The members of the Vienna School, among others, still maintain this principle. See Kelsen, op.cit.pp.215 and 220; Verdross, op.cit. pp.202-203; and Kunz, Teoría General del Derecho Internacional,Cursos de la Academia Interamericana de Derecho Comparado e International, Havana, 1952,vol.II, p. 411.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

and more logical to formulate the question from the standpoint of the safeguards required for the rights enjoyed by other States with respect to the various uses of the high seas, as Alvarez indicates in his individual opinion and the Court itself implies. If, as the Court declared, the "validity of the delimitation (of the territorial sea) with regard to other States depends on international law", when objection is raised to the breadth claimed by a coastal State for its territorial sea, it would be sufficient to determine, by the appropriate procedure or method of settlement, whether that breadth is legitimate in the light of the general principle of the freedom of the seas or of the principle specially guaranteeing the acquired or historic rights that some States may claim in the parts of the high seas affected by the extension.

Must a maximun limit and a uniform breadth be fixed for all States?

Let us finally consider the question whether the breadth of the territorial sea must in every case have a maximun and whether the breadth must be the same for all maritime States. On neither of these two aspects does any final opinon appear to have been formed. Regarding the first, the following statement is to be found in one of the paragraphs of the previously cited article of the International Law Commission: "The Commission considers that international law does not permit an extension of the territorial sea beyond twelve miles". As stated in the Commentary on this part of its decision, "The Commission noted that the right to fix the limit of the territorial sea at three miles was not disputed. It states that international law does not permit that limit to be extended beyond twelve miles... It follows from the foregoing that the Commission came out clearly against claims to extend the territorial sea to a breadth which, in its view, jeopardises the principle that has governed maritime law since Grotiuos, manely, the freedom of the high seas. On the other hand, the Commission did not succeed in fixing the limit between three an twelve miles".[49] Regarding the second question, practice provides material which may assist in determining whether the breadth of the territorial sea should be common to all States or whether it is preferable and justified to accept limits varying according to the factors and needs peculiar to each of them, or characteristic of certain region. We have in mind, more particularly, the case of the coastal States of the Maditerranean, which, with the apparent acquiescence of other States, have established a limit of six miles.

The breadth of the territorial sea and the other extensions of State competence

This brief review of the aspects of the question of the breadth

---

49. See paragraphs (7) and (8) of the Commentary on Article 3 in the Report referred to in footnote 17.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

of the territorial sea would be incomplete without a reference to the primary importance of the use and conservation of the riches of the sea in its connexion. It is common knowledge that the opposition always shown to extensions of the traditional limit of three miles is mainly due to interest in the exploitation and conservation of these resources and that this opposition is the chief reason why coastal States have abandoned and rejected the marine league rule. Indeed, whenever biological factors and economic needs, inter alia, have been cited in favour of such States the purpose has been none other than to justify a right or an interest of the coastal State in than to exploitation of the resources of the sea beyond the three-mile limit. For this reason, any argument or view put forward with view to settling the question would be devoid of foundation if it did not take into account the other special interests and rights which the coastal State is either acknowledged to have or has itself claimed with respect to the use and conservation of particular resources or of those to be found in particular parts of the sea contiguous to its territory. Accordingly, when we examined all these interests and rights and their position in the present state of development of international law, we shall be in a position to reconsider the question in the light of all the factors that must be known in order to arrive at a suitable solution.[50]

9. THE BASELINE OF THE TERRITORIAL SEA AND THE NEW CONCEPT OF "INTERNAL WATERS"

"Internal waters": their juridical nature and new areas included therein

The territorial sea is not the only area of water over which the coastal State can exercise sole sovereignty and jurisdiction. Under traditional international law, territorial sovereignty also extends to the so-called "internal (or inland) waters", which include not only lakes and rivers but also certain waters or areas of sea more or less enclosed by various parts of the State's territory. Since their link with the land is generally much closer than that of the territorial sea, the rights of the coastal State in such waters or areas of sea have always been regarded as subject to fewer limitations or exceptions than in the case of the territorial sea. Though other difference may distinguish and characterize the juridical regime applying to each of these areas of sea, the most outstanding of all is the fact that the right of innocent passage accorded to foreign shipping in the territorial sea has not been recognized as far

---

50. See in this connexion chapter V, section 28, below.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

as internal waters or seas are concerned.[51] But this, like any other difference that exists or might be pointed out, would not affect the juridical status of this area of sea as far as the aspect of specific interest to our study in concerned, for these areas or waters of the sea are ones in which the coastal State can reserve for itself or its nationals the right of use and exploitation of the resources to be found there.

Now, the concept of "internal waters" in traditional international law, apart from lakes and rivers and certain enclosed seas, or seas communicating with the high seas by a strait, embraced only the waters of ports and certain bays or gulfs assimilated to bays. Outside these specific cases, it was not regarded as conceivable for any other area to qualify for the same juridical status. However, in contemporary international law, the concept has been so broadened that it is essential, when studying the new extensions of State competence, not to overlook the vast areas of sea which have recently been incorporated in the internal waters of States. This legal development is due to the path followed by the baseline of the territorial sea in cases where geographical conditions have enabled the State to depart from the general principle determining the landward limit of the territorial waters. In order the better to appreciate this new extension of territorial sovereignty over the sea, let us briefly explain how the situation arises.

---

51. On the different regime applying to these two areas of sea, see Oppenheim-Lauterpacht, International Law, (8th ed.,1955), Vol.I, pp.460-461; Brierly, The Law of Nations,(Oxford,1950), p. 667; Gidel, op.cit., p.44 et seq.; Kelsen, op.cit.,p.223; and Accioly, op.cit., p. 94. On the question of the right of innocent passage, the International Law Commission, at its eighth session (1956), admitted that: "Where the establishment of straight baseline has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage through those waters shall be recognized by the coastal State in all those cases where the waters have normally been used for international traffic." In stating this, it was not the intention of the Commission to abandon the general principle that the right of innocent passage is not recognized in internal waters but merely to establish an exception which it deemed justified in view of the nature and purpose of the system of straight baselines. As it explains in its Report, "The Commission was, however, prepared to recognize that if a State wished to make a fresh delimitation of its territorial sea according to the straight baseline principle, thus including in its internal waters parts of the high seas or of the territorial sea that had previously been waters through which international traffic passed, other nations could not be deprived of the right of passage in those waters. Paragraph 3 of the article is designed to safeguard that right." See Report referred to in footnote (17), article 5, and paragraph (6) of the Commentary

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

The system of straight baselines

The method traditionally adopted to determine the baseline or landward limit of the territorial sea is the "low water mark" following the sinuosities of the coast. However, in the case of a deeply indented coast with considerable openings or clefts, or fringed with islands and shoals, or in the case of islands or archipelagos lying off the coast, application of the general principle would come into conflicto with geogrphical or other factors which may point to special needs or interests of the coastal State. By analogy with the system applied from ancient times to bays and islands and shoals situated wholly or in part within the territorial sea, the baseline, instead of following the sinuosities of the coast, has been drawn between headlands of the coastline and between any islands or shoals and from them to the coast. Irrespective of the length that these closing lines may have, of the distance to be preserved from the coast and of any other element or factor that must be present to justify the use of the system, the areas of sea enclosed by these baselines acquire the juridical status of "internal waters" of a State.

The Codification Conference at the Hague

The system of "straight baselines", as it has recently been entitled, was examined by the Conference at the Hague.[52] Although no conclusion was reached in this connexion, prior agreement on the breadth of the territorial sea being considered essential, the deliberations of the Conference undoubtedly marked a historic step of great importance in the development and acceptance of the system. In the first instance, the question was raised in view of its close relation with the problem of bays, which was also in the list of subjects drawn up by the Preparatory Committee of the Conference. The Bases of Discussion prepared by the Committee did not however broach all aspects of the question. They dealt only with the case of bays (Nos.7, 8 and 9) and of groups of islands or archipelagos (No.13). As far as bays were concerned, the closing line was to be drawn across the opening, unless this was more than ten miles wide, in which case the line was to be drawn at the nearest point to the entrance at which the opening did not exceed ten miles. An exception from this limitation was made in the case of bays placed by "usage" under the exclusive jurisdiction of the State, i.e. so-called "historic bays". The closing line was to separate the territorial sea from the waters of the bay, which would have the status of "inland waters". As far as archipelagos

---

52. The question had already been raised in connexion with bays in Dr. Schücking's Report on Territorial Waters. Cf. Committee of Experts for the Progressive Codification of International Law, Doc. C.44.M.21. 1926. V., p. 14.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

were concerned, when the islands within the circumference of the group were not more than twice the breadth of the territorial sea apart from one another, the latter was to be measured from the outermost island of the group. Waters included within the group were also to be "territorial waters".[53] As can be seen, the Preparatory Committee, apart from not contemplating all the possible geographical cases to which the system could apply, placed serious restrictions on the tracing of the demarcation lines.

During the Conference, many of these omissions and weaknesses were pointed out by the delegations of countries particularly concerned with the system. Of all the proposals and observations made, the most comprehensive was that submitted jointly by Norway and Sweden. According to this proposal:[54]

"The breadth of territorial waters shall be measured from straight lines drawn along the coast from one landmark to another. Any part of the territory may be used as a landmark, including islands, islets and rocks left exposed at the ordinary level of the lowest tides. As regards bays and coastal archipelagos in particular, these straight lines shall be drawn across the opening either of bays or of intervals of sea from the outward side of the archipelago. Each State shall fix the said baselines for its coasts. It may not, however, make these baselines longer than is justified by the rules generally admitted either as being an inter - usage in a given region or as principles consecrated by the practice of the State concerned and corresponding to the needs of that State or the interested population and to the special configuration of the coasts or the bed of the sea covered by the coastal waters."

The joint proposal brought out two fundamental aspects of the system: the geographical cases to which it could apply and the circumstances that justified it; permitting its application to bays and archipelagos, and establishing objective criteria for determining the length of the lines of demarcation.

Only certain aspects of the considerations and conclusions advanced by Sub-Committee No. II of the Conference can be regarded as a contribution to the development of the traditional system. In its commentary on its article on baselines, the Sub-Committee admitted two exceptions to the low-water-mark

---

53. Cf. League of Nations, Conference for the Codification of International Law, Bases of Discussion, Vol.III, C.75.M.69. 1929. V, pp.35, et seq.

54. Cf. League of Nations, Doc. referred to in footnote 11, p.191.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

rule: islands near the coast and grops of islands. In fixing the closing line of bays, however, it accepted the limit of ten miles on the ground that this was the one adopted, inter alia, in the North Sea Fisheries Convention of 1882. Furthermore, according to the Sub-Committee's report, most delegation agreed to a width of ten miles, provided a system were simultaneously adopted under which slight indentations would not be treated as bays.[55] Finally, the Second Committee, in stating its inability to formulate any conclusion on the question, expressed an opinion which might be regarded as in favour of applying the system of straight baselines more widely than the Sub-Committee had done. In its view, the problem of the status of the waters when the system in question is applied is by no means confined to "historical bays", but "arises in the case of other areas of water also".[56]

Attitude of the International Court of Justice

The International Court of Justice, when settling the Anglo-Norwegian dispute, dispelled all doubt as to the manner and scope of application of the system of straight baselines in determining the landward limit of the territorial sea. In stating the reason for its award, the Court drew attention to certain objective criteria for judging the validity of the delimitation of the territorial sea of a State applying the system, criteria which it considered inherent in the juridical nature of the area of sea in question. The following is a passage from the Award:[57]

"Among these consideration, some reference must be made to the close dependence of the territorial sea upon the land domain. It is the land which confers upon the coastal State a right to the waters off its coasts. It follow that while such a State must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of baselines must not depart to any apreciable extent from the general direction of the coast..

Another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them. The real question raised in the choice of baselines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters. This idea, which is at the basis of the determination of the rules relating to bays, should be liberally applied in the case of a coast, the geographical configuration of which is as unusual as that of Norway.

Finally, there is one consideration not to be overlooked

---

55. Ibid, pp. 217-218

56. Cf. Report by the Rapporteur of the Committee (Professor François), op.cit. p. 211

57. See the publication of the Court referred to in footnote 43, p. 21.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage."

As the Court pointed out, these criteria or considerations, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question. The award, declaring the Norwegian system of delimitation to be valid, also indicated the latitude with which the criteria must be interpeted and applied in practice. In this respect, there is a marked contrast with the ideas prevailing at the Conference at the Hague, particularly as regards the criterion for fixing the points between which straight baselines may be drawn. The only limitation indicated in that connexion was that the drawing of the baselines must not depart to any appreciable extent from the general direction of the coast. The Court moreover agreed that closing lines could be drawn from any point in the land formations provided that the link between them and the adjacent waters was sfficiently close for the latter to be regarded as internal waters.

When considering the question of the closing line of bays, the Court also abandoned the limit in terms of figures adopted by Sub-Committee No.II of the 1930 Conference. In another passage in its Award, it stated explicitly that "the ten-mile rule has not acquired the authority of a general rule of international law", while in one of the paragraphs quoted above, it emphasized that in determining the rules relating to bays the fundamental question is "whether certain sea areas lying within those lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters". Arguing from this, the Court, without fixing a maximun distance, accepted as valid lines drawn by Norway between points 30, 39 and 40 miles apart. In this respect, the Court seems to have accepted the objective view that the closing line should be drawn between the natural geographical entrance points of the bay (inter fauces terrae) i.e. between the points at which the indentation ceases to have the configuration of a bay[58].

Finally, in considering the case of groups of islands or archipelagos, the Court again rejected the idea of fixing the maximum limit of the baselines in terms of figures. It defines its position on this point by the following extract from the Award[59]:

"The Court now comes to the question of the length of the baselines drawn across the waters lying between the various formations of the "skjaegaard". Basing itself on the analogy with the alleged general rule of ten miles

---

58. Ibid, pp.192-29

59. Ibid, p. 19.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

relating to bays, the United Kingdom Government still maintains on this point that the length of straight lines must not exceed ten miles.

In this connexion, the practice of States does not justify the formulation of any general rule of law. The attempts that have been made to subject groups of islands or coastal archipelagos to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters, or ten or twelve sea miles), have not got beyond the stage of proposals."

Groups of islands or archipelagos can be considered from two standpoints: as land formations near to the mainland or a major island, or as an independent group of islands or archipelagos. The case of which the Court was seized came in the first category, but since it is viewed in general terms, the principle accepted by the Court, as will be seen further on, applies, by analogy, to the second case too.

Position of the International Law Commission

The International Law Commission, when reviewing its draft on the territorial sea at its seventh session (1955), changed its position and adopted the criteria applied by the Court in the Anglo-Norwegian case. According to the new text of article 5 of the draft[60]:

"Where circumstances necessitate a special regime because the coast is deeply indented or cut into or because there are islands in its immediate vicinty, or where this is

---

60. Cf. Report covering the work of its seventh session(A/2934), p. 17. The previous text of the Commission contained a second paragraph establishing a numerical limit: "As a general rule, the maximun permissible length for a straight baseline shall be ten miles. Such baselines may be drawn, when justified according to paragraph 1, between headlands of the coastline or between any such headland and an island less than five miles from the coast, or between such islands. Longer straigh baselines may, however, be drawn provided that no point on such lines is more than five miles from the coast. Baselines shall not be drawn to and from drying rocks and shoals." Cf. Report covering the work of its sixth session (A/2693). p. 14.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

justified by economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage, the baseline may be independent of the low-water mark. In these special cases, the method of straight baselines joining appropriate points may be employed. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within these lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters. Baselines shall not be drawn to an from drying rocks and drying shoals."

The Commission, however, maintained the numerical limit on the closing line of bays. In line with the amendment which I submitted to the former article 5 of the draft, I had also submitted a text according to which the line would be drawn "between the natural geographical entrance points where the indentation ceases to have the configuration of a bay".61

The Commission did not accept that criterion and stipulated that, for the waters of a bay to be regarded as internal waters, the distance between the closing line and the low-water mark must not exceed twenty-five miles. In addition to that limitation, "where the entrance of a bay exceeds twenty-five miles, a closing line of such length shall be drawn within the bay".62 It was to be hoped that at its eighth session, when preparing its final report to the General Assembly, the Commission would have revised its attitude to bring it into line with the objective criterion applied by the Court and with the new system of straight baselines the latter had adopted.63 The twenty-five mile limit,

---

61. Conf. Room Doc. No. 35 (VII)

62. Cf. Report covering the work of its seventh session (A/2934), p. 18.

63. At its eighth session, the Commission revised the text previously adopted, inverting the order of the criteria as follows: "Where circumstances necessitate a special regime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, the baseline may be independent of the low-water mark. In these cases, the method of straight baselines joining appropriate points may be employed. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters. Account may nevertheless be taken, where necessary, of economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage. Baselines shall not be drawn to and from drying rocks and drying shoals." Cf. Report covering the work of its eighth session (A/3159), article 5.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

applying both the maximun distance between the closing line and the low-water mark and to the length that the baseline may have, is not justified by any geographical or other consideration. It is in fact an arbitrary limit incompatible with the determining geographical and economic factors to be observed in countries whose coasts have such deep indentations.[64]

The Commission decided not to devote a special article to the question of groups of islands or archipelagos. However, as it explained in its Report: "The Commission points out, for purposes of information, that article 5 may be applicable to gruops of islands lying off the coast".[65] In this case, the Commission's view is not opposed to the doctrine and generally accepted practice on the subject, i.e. that the criterion applicable to the case of groups of islands or archipelagos taken as such is not necessarily or solely that of the length of the straight baselines to be traced nor the breadth or the areas of sea enclosed between them, but an objective criterion similar to that applied in the case of coastal gropps of islands or archipelagos.[66]

10. OTHER ZONES OF EXCLUSIVE EXPLOITATION: THE "EPICONTINENTAL SEA" AND THE 200-MILE "MARITIME ZONE"

"Zones of exclusive exploitation"

The territorial sea and the internal waters or seas are not the only marine areas over which attempts have been made to extend the full competence of the State or some of its sovereign rights. Certain extensions of competence exist which are of relevance to this study, namely those made with a view to the exclusive use and exploitation of the living resources either of certain areas of sea, or of particular species, outside the internal waters and the territorial sea. As will be seen later, these new extensions of sovereign competence, too, do not have the same legal, scientific or economic basis in every case, although as regards their nature and purpose, they have a common denominator, the fact that they confer on the coastal State the sole right to

---

64. In the text approved at the eighth session, the distance was reduced from twenty-five to fifteen miles. Ibid., article 7

65. Ibid., paragraph (4) of the commentary on article 10.

66. See in this connexion, Gidel, op.cit., Vol.III, pp. 706-717 and Higgins and Colombos, op.cit., p. 79

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

full or partial use of the marine fauna in a particular zone. Two cases in this general category of "other zones of exclusive exploitation" are particularly well-known: the "epicontinental sea" and the 200-mile "maritime zone". But these are not the only cases of this category of extension of sovereign competence, past or present. To study them in the order that best fits their individual features, we shall begin with thoese designed to ensure the exclusive exploitation of only one or more particular species.

The "Right of property and protection" over fur seals

A historic instance in this class is provided by the measures taken by the United States in 1886 in connexion with the fur seal fishery in the Behring Sea outside the three-mile limit. These measures, to quote the United States Government, were taken in exercise of a right of "property and protection" based on the mode of life of the species, the extent to which the coastal population contributed to its maintenance and propagation and the importance of the fishing industry for the economy of that population. Great Britain, whose nationals were affected by the prohibitory measures, protested against them on the ground that the species in question was generally considered as in the category of "ferae naturae" and that its mode of life prevented its being regarde as an object of ownership. The Arbitral Tribunal set up to settle the dispute under the Treaty of 15 August 1893 decided that "the United States had not any right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit".[67]

The "Principle of abstention"

The grounds invoked to justify the exclusive exploitation of the fur seals in the Behring Sea were later used to claim similar rights with respect to other species, for example in the case of the so-called "principle of abstention". This principle sprang from the system or procedure put into force from 1923 onwards by the United States and Canada to check the steady decrease in the yield of halibut in the North Pacific and to try and bring it up to a sustained maximun by the abstention of their nationals from fishing the species. Thus it was a "conservation" system or procedure in the strict sense of the term and as such was incorporated in the International North Pacific Fishery Convention which was signed by Canada, the United States and Japan and came into force in 1953. One aspect of the

---

67. For other details and aspects of this dispute, see Leonard, L.L., International Regulation of Fisheries (Washington, 1955), p.55 et seq.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

"principle of abstention" has emerged of late which, though also bound up with the problem of conservation and hence with its objectives, lends it wider scope. In its observations on the 1955 Draft of the United Nations International Law Commission, the United States Government drew attention to "situations where States have, through the expenditure of time, effort and money on research and mangement, and through restraints on their fishermen, increased and maintained the productivity of stocks of fish, which without such action would not exist or would exist at far below their most productive level". Under such conditions, it suggested that "when the stocks are being fully utilized, that is, under such exploitation that an increase in the amount of fishing would not be expected to result in any substantial increase in the sustainable yield, then States not participating, or which have not in recent years participated in exploitation of such stocks of fish, excepting the coastal State adjacent to the waters in which the stocks occur, should be required to abstain from participation".[68]

As can be seen, the right claimed is not exactly an absolute and unlimite one to the exclusive exploitation of certain species, for recognition of the right is subject to the presense of specified conditions and circumstances. Firstly, third States would not be required to abstain from fishing the species in question if an increase in fishing would lead to "a large increase in the sustainable yield". Secondly, regardless of whether that condition is fulfilled, any States which participate or have participated in recent years in the exploitation of the species, together with the coastal State, irrespective of whether it participates or has participated, are excepted from the rule. However, these exceptions apart, the right to fish the species would be reserved for the State or States which had contributed to the increase in or sustention of the yield.

Cases envisaged by the Inter-American Council of Jurists

Other types of claim to the exclusive exploitation of particular species have been formulated in which the right is not subject to the same conditions and circumstances as in the above case. The examples we have in mind are the different cases covered by resolution XIII of the Third Meeting of the Inter-American Council of Jurists, already mentioned in connexion with the question of the breadth of the territorial sea. Section C of the resolution, headed "Conservation of the Living Resources of the High Seas", contains the following paragraph:

"2. Coastal States have, in addition, the right of exclusive exploitation of species closely related to the coast,

---

68. Cf.Doc.A/CN.4/99/Add.1,pp.80-81. On the "principle of abtention", in general, see Herrington, W.C., "Comments on the principle of abstention", Doc.A/Conf.10/L.19 of the International Technical Conference on the Conservation of the Living Resources of the Sea (Rome, 1955).

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

the life of the country, or the needs of the coastal population, as in the case of species that develop in territorial waters and subsequently migrate to the high sea, or when the existence of certain species has an important relation to an industry or activity essential to the coastal country, or when the latter is carrying out important works that will result in the conservation or increase of the species."

The records of the Council Meeting do not shed sufficient light on this part of resolution XIII to enable us to see what the bases of these various cases of exclusive exploitation are. As pointed in the Introduction, the Council was not qualified either by its terms of reference or by its composition to consider the technical, scientific and socio-economic aspects on which the solution of this problem depends.[69] The Inter-American Specialized Conference, which met a few weeks later, decided nothing on this point and did not even consider it directly.

We shall be returning to this problem later in order to see whether, or to what extent, the coastal State can in certain cases legitimately invoke this sole right of exploitation. For the moment, let us see what other forms it takes. To judge from the way the claim is put, what is involved is no longer a right to the exploitation of certain species but an extension of sovereign competence over certain areas of sea and, hence, an equally exclusive right to exploit all the living resources therein. As in previous cases, we shall find certain nuances in the typical formulations of this extension of competence. Let us first consider those relating to the zone known as the "epicontinental sea".

Earliest formulations of the doctrine of the continental shelf

The first formulations of doctrine on this zone of exclusive exploitation were scientific and economic in character. At the National Conference on Fisheries at Madrid in 1918, the Spanish oceanographer, Odón de Buen, maintained the thesis that while the domain of the ocean should be for all, "the continental shelf should belong to the nation to whom the coast belongs, because it is a continuation of it and the land has an even greater influence on it than the sea." Arguing from the fact that "the sedentary species are, so to speak, domiciled there -species that support the local fishing industry on which the greater part of the activities of the coastal population depends", he proposed that the "jurisdictional waters be extended to cover the whole continental shelf".[70] The Argentinian professor, José León

---

69. See p. above. In connexion with resolution XIII and the documents of the Meeting of the Council of Jurists, see the document referred to in footnote 79.

70. Cf. Azcárraga, J.L. de, La Plataforma Submarina y el Derecho Internacional, (Madrid, 1952), p. 137.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Suárez, in some lectures delivered the same year in Sao Paulo, Brazil, went at greater length into the scientific and economic aspects of the new theory and also agreed on the need to extend the territorial sea, because "trade requires it and, above all, fishing, whaling and sealing, as the life cycle of the most valuable species gravitates between the territorial sea and the open sea, which are separated from each other only by an imaginery man-made barrier but constitute by their nature and form a single, continuous whole".71 This theory was maintained on subsequent occasions though not always in connexion with the idea that the territorial sea should extend to the limits of the continental shelf. Barbosa de Magalhaes, for instance, in his observations on Dr. Schücking's Report on Territorial Waters, proposed fixing the breadth of the latter at twelve miles, basing his arguments on the conclusions reached by Admiral Almeida d'Eça regarding the species living or to be found in the waters covering the shelf.72

Claims to an "Epicontinental Sea": Mexico and Argentina

These formulations of the "doctrine of the continental shelf" as it is generally called have served as a basis for the claims laid by some States in recent years to an "epicontinental sea". These claims must not be confused with others made by the same and other States with regard to the bed and subsoil of the shelf or to other submarine areas adjacent to their territory. As will be seen in the next chapter, the great majority of these national claims did not affect the status of the waters covering those areas outside the territorial sea. The claims whose nature and scope did affect it are those whose object regardless of whether the term "epicontinental sea" was used or not was to establish a new maritime zone for the exclusive exploitation of the living resources therein. The two earliest claims of this kind were

---

71. Cf. "El Mar Territorial y las Industrias Marítimas", in Diplomacia Universitaria Americana (Buenos Aires, 1918), p.172. See also Professor Suárez's Nations Committeee of Experts for the Progressive Codification of International Law, which is annexed to Doc. C.49.M.26. 1926.V. Another Argentinian, Capitán de Fragata Segundo R. Storni, had raised the question before, in 1916, and had spoken of the "Argentinian sea" with reference to the continental shelf adjacent to his country. See Flouret, T., La Doctrina de la Plataforma Submarina (Madrid, 1952), pp.93-94.

72. See League of Nations, Doc. referred to in footnote 25, pp. 63-65.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

those of Mexico and Argentina. In an amendment to the Constitution proposed by the Mexican Executive it is stated that "The waters of the sea covering the continental shelf and submarine terraces.... are also the nation", while in an Argentinian decree "the Epicontinental Sea and the Argentinian Continental Shelf" are declared to "belong to the sovereignty of the Nation". Two other Latin American countries, Panama and Honduras, have made similar claims[73], the "epicontinental sea" being likewise declared part of the national domain, in the "Declaration of Antigua Guatemala", adopted on the foundation of the Organization of Central States (ODECA). The idea is also taken up in the above-mentioned resolution XIII of the Inter-American Council of Jurists, though, as will be seen, expressed in different terms. Apart from those expressions of the doctrine of the continental shelf, other collective statements have been made on the American continent which do not involve such wide claims. They are the decision adopted by the Inter-American Council of Jurists at its Second Meeting (Buenos Aires, 1953), the position taken by the Tenth Inter-American Conference (Caracas, 1954) and, in particular, the conclusion reached and statement issued on the point by the Specialized Conference at Ciudad Trujillo in March of the same year.[74]

Iceland's "Exclusive jurisdictions over fisheries in the coastal area"

The doctrine of the continental shelf has also served as a basis for other zone of exclusive exploitation which, without being identical in nature and extent with the "epicontinental sea", can nonetheless be regarded as versions of this maritime zone. We have in mind the "exclusive jurisdiction over fisheries in the coastal area" claimed by Iceland on the ground that on the (continental) platform invaluable fishing banks and spawning grounds are found upon whose preservation the survival of the Icelandic people depends." The italicized word points to another of the well-known features of this extension of competence: that its essential purpose is to meet the need for conservation of the resources in the area concerned, i.e. to prevent a decline in their yield likely to affect the national economy. Thus, the "exclusive jurisdiction" is established with a view to conservation. In that respect, it shows a marked analogy with the 'principle of abstention' previously discussed, though it contains a new element distinguishing it from the former conservation system or procedure, namely, the way in which the concept of "conservation " is linked with the needs or interests of the population of the coastal State. This link naturally means that the latter

---

73. For a fuller statement of these claims, see below, pp. et seq.

74. For a fuller description of the position of the inter-American organizations and conference on the subject, see below, pp. , et seq.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

considerations can also affect the interpretation of the aims of conservation, in the technical and scientific sense of the term, and that the conservation measures are adopted more with a view to the socio-economic factors involved.

This is what seems to emerge from the observations of the Government of Iceland on the International Law Commission's 1955 draft on the conservation of the living resources of the sea. These observations contain the following statament regarding the adoption of measures of conservation by international agreement. "If that is not possible the coastal State could adopt the necessary measures but, inter alia, such measures must not discriminate against foreign fishermen. This system is reasonable if applied to the area beyond the limits of exclusive coastal jurisdiction over fisheries, provided the interests of the coastal State in such jurisdiction are reasonably protected. Within the limits of exclusive coastal jurisdiction foreign fishing can of course be prohibited by the coastal State." Iceland hastens to add "This is an incontrovertible fact. But to say that such limits are fixed at e.g. three miles has no realistic foundation. What is called for is an appreciation by the coastal State of its own needs up to a reasonable distance."[75]

The 200-mile "Maritime zone": Its economic and social bases

Let us finally consider the 200-mile "maritime zone" to see what are its scientific and socio-economic bases and its exact juridical nature. First of all, however, it should be clear that we are referring solely to the position taken by the three countries of the South-Pacific seaboard of Latin America, more particularly as stated in the "Maritime Zone Declaration", which they signed at Santiago de Chile on 18 August 1952 and the

---

75. Cf. Doc. A/CN.4/99/Add.2, pp.8-9. On other antecedents akin to Iceland's attitude, see its observations on the Commission's 1951 drafts, Doc. A/2456, pp.55 et seq and The Icelandic Efforts for Fisheries Conservation, Memorandum submitted to the Council of Europe by the Government of Iceland, 1955 and the Additional Memorandum of October 1955. The Korean "Presidential Proclamation of Sovereignty over Adjacent Seas", of January 1952, which is related also to the continental shelf, establishes another zone of exclusive exploitation with respect to the area covered by the lines of demarcation fixed by said Proclamation.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Protocol of Accession to the Declaration signed by the same countries at Quito on 5 October 1955 to which the Government of Costa Rica also adhered.[76] We are not referring, of course, to the clause in the constitution of El Salvador, which also speaks of an "adjacent sea up to a distance of 200 nautical miles", as this relates to the territorial sea proper and not to an extension of competence of the type under consideration. Nor shall we study for the moment the aspects of the "maritime zone" related to the continental shelf or other submarine areas, since, as will be seen in the next chapter, the appropriation of the bed and subsoil of these areas in the case of this zone is rather a consequence of the rights proclaimed over this broad stretch of sea than direct object of the claim.

The economic and social considerations underlying the claim to the 200-mile maritime zone are outlined in the Preamble to the Santiago Declaration,[77] according to which: "Governments are under an obligation to secure the necessary conditions of subsistence for their peoples and to provide them with the means for their economic development. Consequently, it is their duty to provide for the conservation and protection of their natural resources and to regulate the exploitation of those resources to the best advantage of their respective countries.... It is therefore also their duty to prevent exploitation of the said resources outside their jurisdiction from heopardizing the existence, integrity and conservation of this wealth to the detriment of nations which, owing to their geographical positions possess in their seas irreplaceable sources of subsistence and vital economic resources."[78]

---

76. Regarding the attitude of inter-American organizations and conferences to this extension of competence, see below, p. 124 et seq.

77. The text of the Santiago Declaration was published in the Revista Peruana de Derecho Internacional (1954), vol.14, p. 104. An English translation is to be found in the Yearbook of the International Law Commission, 1956, Vol.I,pp. 169-170.

78. The Peruvian Decree of 1 August 1947 mentions, inter alia, that "The protection, conservation and regulation of the use of the fishing stocks on which the guano birds feed is also necessary in order to safeguard the source of fertilizer deposited by them on the islands off the Peruvian coast" cf. García Sayán, Notas sobre la Soberanía Marítima del Perú, Lima 1955, Annex 1, page 45. See also "El Guano de Isla Peruano, un Recurso Natural renovable del Mar", statement by Mr. Erwin Schweigger, representative of Peru at the Specialized Conference of Ciudad Trujillo, Doc. 55.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

In paragrph 1 of its operative part, the Declaration refers to the fact that "Owing to the geological and biological factors governing the existence, conservation and development of the marine flora and fauna in the waters which wash the coasts of the States Parties to this Declaration, the former breadths of the territorial sea and the contiguous zone are inadequate for the conservation, development and exploitation of these resources, to which the coastal States are entitled." We will see later what these scientific bases of the Declaration are, but first let us consider the other socio-economic considerations not explicitly referred to in the Santiago Declaration.

We have in mind in particular the frequent claim that the countries which have no continental shelf should be compensated by recognition of other rights over specific areas of sea contiguous to their territory. During the deliberations of the Third Meeting of the Inter-American Council of Jurists, the representative of Peru, Professor Alberto Ulloa, expressed the view that Joint Declaration of the three American republics of the South Pacific seaboard constituted a "just rule, in that.... it represents compensation to those countries which have no continental shelf There can be no reason in justice, and, in final analysis, every reason in justice is a moral reason, there can, I repeat, be no reason in justice why many countries should have a broad submarine zone as a result of prehistoric geological upheavals while others should have none. The idea fo compensation is not the sole basis for the Santiago Declaration but it is one of the most solid bases vis-á-vis other States and one that cannot be ignored".79 The same thesis was developed at greater length by a representative of Ecuador at the Specialized Conference of Ciudad Trujillo. In this opinion "We take the fair, human and absolutely just view that were nations to take the limit of their continental or insular terraces, as the case may be, as the limit of their territorial sea, many such nations would find themselves in a position of inferiority by comparison to others, since the submarine terrace alone is not sufficient to create that equality conducive to wellbeing. The important thing is not the contour of the submarine areas but the maritime resources that will produce that wellbeing. We know full well that the stocks of fish in the submarine areas, to confine ourselves to them for the moment, may be abundant but may also be scanty, despite the scientific view that the epicontinental sea is the richest in fish... But we must also admit that there may be abundant stocks of fish where no submarine terrace exists and scanty stocks on extensive and well-defined terraces... In the case of the countries of the west coast of South America,

---

79. See Records and Documents of the Third Meeting of the Inter-American Council of Jurists, Provisional edition, Pan-American Union, Washington, D.C., 1956, p.30.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

we know that these countries have a narrow continental shelf but that, at the same time, a broad current running parallel to their coasts creates one of the most prodigious sources of fish in the world..."[80]

The scientific bases of the 200-mile "maritime zone"

The scientific foundation of the Santiago Declaration, also according to the informed opinion of representatives of the signatory States, is derived from the concepts of the "eco-system" and of the "bioma". During the Santiago Negotiation on Fishery conservation Problems, conducted by the three member States of the Permanent Commission for the Exploitation and Conservation of the Maritime Resources of the South Pacific together with the United States, the former maintained the following:"[81]

> "Modern biologists and ecologists have called the sum of non-biotic factors, mainly climatological and hydrological, which are capable of creating a particular situation, that will permit an aggregate of vegetable and animal beings to live within it, and 'eco-system'.
>
> Within an 'eco-system' many living communities, including man, may co-exist in a perfect chain, or succession, constituting a whole which is called a 'bioma'. Therefore the term 'bioma' designates the whole of the complex of living communities of a region, which under the influence of the climate and in the course of centuries, becomes constantly more homogeneous, until, in its final phase, it becomes a definite type.
>
> An 'eco-system' may sustain one or more 'biomas', but each one of these will maintain its unity within the system, except in the areas of contact where there may be an intermixing. For example, in the region of influence of the Peruvian Current, it is admitted that within the existing 'eco-system' there are implanted, together with the central Peruvian 'bioma', a warm water 'bioma', a warm water 'bioma' belonging to Ecuador, and a cold water 'bioma' belonging to the the North-Chilean region. The western limits of these 'bioma' are variable, and they are wider opposite the

---

80. "La Plataforma Submarina: Falso Limite Marítimo de los Estados", Technical study submitted by the representative of Ecuador to the fifth meeting of Committee I, Doc. 69, p.8

81. Cf. Santiago Negotiation on Fishery Conservation Problems, Department of State, Doc. No. 2, p. 31

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Chilean coast, and narrower opposite Ecuador, but the mean width may be taken to be about 200 miles."

.....

"From the above we infer that a perfect unity and interdependence exists between the communities that live in the sea, which supports their life, and the coastal population which requires both to survive.

This is, in short, the concept of biological unity from which is derived, in the scientific field, the preferential right of coastal countries. According to this concept, the human population of the coast forms part of the biological chain which originates in the adjoining sea, and which extends from the microscopic vegetable and animal life (phytoplankton and zooplankton) to the higher mammals, among which we count man."

The same ideas were put forward at the Inter-American Specialized Conference of Ciudad Trujillo in connexion with the juridical position of the signatories of the Santiago Declaration.82

Juridical nature of the maritime zone and objects of the Santiago Declaration

After the socio-economic considerations of the Preamble and the reference to the geological and biological factors on which it is also based, the Santiago Declaration goes on to state that: "The Governments of Chile, Ecuador and Peru accordingly proclaim, as a principle of their international maritime policy, the exclusive sovereignty and jurisdiction to which each of them is entitled over the sea which washes the coasts of their respective countries, to a minimun distance of 200 nautical miles from the said coasts". In a later paragraph the Declaration describes the limitations to which the exercise of this maritime competence of the coastal State is subject in the following terms: "The present Declaration implies no disregard for the necessary limitations on the exercise of sovereignty and jurisdiction imposed by international law in favour of innocent and inoffensive passage by ships of all nations through the specified zone". These two paragraphs of the Declaration are the chief clue to the true juridical nature of this extension of competence. The paragraphs previously quoted must be taken into account as well however, since they indicate the purposes for which the "maritime zone" was established. But what is this zone? Is it, as has

---

82. See, inter alia, Sobre el Concepto de Bioma, Statement by Mr. Parmenio Yáñez, Chilean representative, Doc. 84, and Efectos de los Factores Naturales y de las Actividades Humanas sobre la Productividad de las Riquezas Marinas, Document submitted by the Peruvian Delegation to the Second Committee, Doc. 73.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

been claimed, a territorial sea in the proper sense of the term, or, as it has also been described, a contiguous zone for the pure and simple purpose of conserving the marine fauna, or is it a maritime zone sui generis?

There seems to be no ground for identifying the 200-mile maritime zone with the territorial sea in the proper sense of the term. In the first place, this term is not used in the Declaration nor did the countries which signed it annul the legal provisions already fixing the breadth of their respective territorial seas. What is more, the purpose of the zone, as expressly stated, is to extend not the entire competence of the coastal State over the new area of the sea but merely its sovereign and exclusive competence for specific purposes up to the limited indicated. The coastal State cannot, therefore, exercise this maritime competence for any other purpose. At the same time, the special nature of this competence must not give the impression that it is a "contiguous zone" in the sense generally attached to that term. As will be seen in the next section, such zones are established purely for the purpose of protecting specific interests beyond the limit of the territorial sea, which, in the case in point, would mean for the purpose of protecting the interests of the coastal State in the marine fauna to be found in the high seas bordering on the territorial sea. In a word, in this case, the zone would be a contiguous zone for the conservation, pure and simple, of the living resources of the sea. Since it does not seem possible to class the zone established by the Santiago Declaration along with this other type of maritime zone, the only alternative is to treat and jugde it as a maritime zone sui generis.

What then are the characteristics of the 200-mile maritime zone that shed light on its true juridical nature? In the first place, there is the actual object of the claim. As will be recalled, the Preamble to the Declaration refers to the duty of Governments towards their peoples to conserve and protect "their natural resources" and to "nations which, owing to their geographical position, possess in their seas irreplaceable sources of subsistence and vital economic resources". The Declaration, therefore, clearly states that the competence vested in the coastal State extends to the resources and waters of the sea belonging to it. Having defined the object of the claim in this fashion, the Declaration also explicity states its purpose, which is not confined to the mere conservation and development of the marine fauna and flora but also embraces the "exploitation of those resources to which the coastal States have a right". And to achieve this double purpose, the Declaration proclaims the "exclusive sovereignty and jurisdiction" of each of the States subscribing to it. Thus, the coastal State is given the power to take all necessary steps to ensure both the conservation and development of the marine resources and their use and exploitation by that State or its nationals.

This question of the juridical nature of the Santiago Declaration was considered at length at the Third Meeting of the Inter-American Council of Jurists. The representatives of the South

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Pacific countries upheld the view that the Declaration was consistent with the principle of the freedom of the seas in that it explicitly acknowledged the right of all States to innocent and inoffensive passage. As the clearly stated, that right did not include the freedom to fish or, at all events, such freedom could not be claimed in any zone of the sea over which a "definite State jurisdiction" extended. On the other hand, they declared that fact did not mean that, under the Declaration, the nationals of third States were excluded from fishing; they could engage in it, provided they complied with any regulations adopted on the subject by the coastal State[83]. As pointed out during the debate, the latter is by no means the same thing as an acknowledgement of the right to fish in a zone where a competence is exercised distinct from that exercised over the territorial sea, but is a mere concession which the coastal State may grant or refuse according to the requirements either of the conservation of the species or their exploitation by the State or its nationals[84]. We now see the true purport of the Santiago Declaration and what, accordingly, is the juridical nature of the maritime zone which it establishes. It is not a "contiguous zone", because it serves other purposes than that of conservation proper. Nor is it a territorial sea in the strict sense of the term, although it coincides with the latter as far as the nature of the right claimed is concerned. These points of contact with two other institutions show it to be a specialized type of extension of sovereign competence. In any case, by the variety of its features and purposes, it is an area of sea sui generis in which, however, those features and purposes constituting the essence of every "zone of exclusive exploitation" are sufficiently clearly defined.

The foregoing description is based solely on the text of the Santiago Declaration. The practical applications of it and certain interpretations recently placed on it must therefore be considered apart. As far as the second are concerned, the Chilean representative, Professor Julio Ruíz B., who signed the Santiago Declaration on behalf of his country, explained, at the Ciudad Trujillo Conference, that a connotation or scope

---

83. See Doc. referred to in footnote 79, pp. 13, 41 and 52. The same view has been expressed by other qualified interpreters of the Declaration, See, for example, García Sayán, op.cit., p.4; Alvarado Garaicoa, T., La Plataforma Submarina y la Nueva Extensión del Mar Territorial (Guayaquil, Ecuador, 1955), passim; Gutiérrez Olivos, s., Mar Territorial y Derecho Moderno (Editorial Jurídica de Chile, n.d.), p. 117 et seq.; and Bustamante y Rivero, José L., Las Nuevas Concepciones Jurídicas sobre el Alcance del Mar Territorial, (Lima, 1955), p.3.

84. See Doc. referred to in footnote 79, p. 155.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

other than that relating to the purpose for which it was employed should not be attached to the term "sovereignty" as used in the Official Declaration of President González Videla (1947). "Chile's aims", in the words of the speaker, "are common to those of all American States, and are to ensure the most economic exploitation by man of scarce marine resources". And he added: "We emphasize these aims because they are an expression of the value placed by men on things or acts. The means of achieving them are a secondary question.... the way is now open to the study of an appropriate legal institution or formula for the safeguarding and protection of the interest of the coastal State in the resources of the sea. Any formula will be satisfactory if it makes possible and hastens the achievement of this important aim."[85] The statement made by the Peruvian delegation appears to be of the same tenor: "The only thing with which the measures of conservation dictated by Peru are concerned is the abuse of the right to fish. Peru is only trying to prevent the existence of the immense wealth in the sea which bathes its coasts from being jeopardized by wholesale and indiscriminate fishing. It has often been stated officially and in international notes, that Peru has no intention of excluding foreigners from fishing in its maritime zone. All that it desires is that they should, in the same way as Peru's nationals, accept and comply with the measures of conservation laid down, and thus preserve for the future an important source of wealth."[86]

If these statements are really tantamount to an interpretation of the right proclaimed by the South Pacific countries, they radically change the juridical nature of the 200-mile maritime zone as stated in the Santiago Declaration. It is no longer a question of a "zone of exclusive exploitation" in which the freedom to fish is not recognized but rather of another area of sea in which the coastal States are vested only with the power of regulating and supervising that freedom. In a word, as will be realized in the next section, it is only an "extension of specialized competence" for the purposes of protecting or conserving the living resources of the sea up to that distance from the coast.

Considerations on the legitimacy of such extensions of competence

Before turning to consider another type of extension of state

---

85. See El Interés Económico de Chile sobre los Recursos Vivos del Mar Vecino a sus Costas, Doc. 67. See also pp. 4 and 5, where it is stated that the Chilean Declaration of 1947, "which was supplemented by other Governmental acts", was made "to enable measures of conservation to be introduced".

86. See "Comentarios y Resumen de las Exposiciones Hechas por la Delegación del Perú", Doc. 72.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

competence, we should pass brief judgment on the legitimacy of such "zones of exclusive exploitation in the light of the present development of international law. At its eighth session (1956), the International Law Commission took cognizance of two of the claims which we have studied: the "principle of abstention" and the "exclusive jurisdiction over coastal fisheries", recognizing in that connexion in its report to the Assembly that it was not in a position fully to examine the implications of the problems and the elements of exclusive use involved therein. It added the following commentary: "The Commission recognized that both this proposal, the purpose of which was to encourage the building up or restoration of the productivity of resources, and the proposals of some other Governments, based on the concept of vital economic necessity, may reflect problems and interests which deserve recognition in international law. However, lacking the necessary competence in the scientific and economic domains to study these exceptional situations adequately, the Commission, while drawing attention to the problem, refrained from making any concrete proposal."[87] It is easy to see the reasons for the attitude adopted by the Commission. In addition to the fact that the claims are incompatible with the traditional concepts and principles of international law, it is clear that a thorough consideration of them would call for knowledge not at the Commission's command.

Such was the situation generally created by the "zones of exclusive exploitation" mentioned in this section. We might, however, mention the considerations to be borne in mind when determining the legitimacy of such zones in the light of international law in its present stage of development. The first and basic consideration is that the zones being part of the high seas, the resources therein have the legal status of res communis, and hence the recognition of an exclusive right of use would be justified only if interests are at stake which are judged superior to the general interest in the exploitation of those resources. The second consideration is the fact that the coastal State may have an interest of this type in the resources of the zone adjacent to its territorial sea or in some species in particular either because they are of vital importance to its economy or for the feeding of its population or because the yield of those resources is due to the efforts and sacrifices it has made to maintain it. But in these cases, as in any other case, the interest would not appear to justify the right of exclusive exploitation so long as fishing by the nationals of third States does not lead to a decline in the optimum sustained yield of the resources. As will be seen when we consider the aims of conservation in a later chapter, so long as the yield is

---

88. Cf. Report referred to in foot-note (17), paragraph (5) of the Commentary on Article 53 and "claims to exclusive right of fishing on enonomic grounds".

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

kept at that level, there would be no point in excluding foreign fishermen from rational exploitation of the resources. Another consideration of primary importance to be borne in mind in certain cases is whether the claim affects rights acquired by a third State. If the latter's nationals have engaged in fishing in the zone in question or have exploited certain species from time immemorial and without interruption, the coastal State cannot claim an interest greater than the historic interest which the third State has shown itself to possess.

Taken together theses considerations point to the conclusion that the exclusive use and exploitation of the living resources of certain zones of the high seas, or of certain particular species, is not necessarily incompatible with international law in the present state of its development. The institution in itself, i.e. in principle, is perfectly admissible but its validity in concrete situations will depend on the degree of legitimacy of the various interests at stake: that which the coastal State can claim and the general interest, or the special interest possessed by particular States.

II. AREAS OF SPECIALIZED COMPETENCE OR "CONTIGUOUS ZONES": THEIR JURIDICAL NATURE AND THE INTERESTS THEY ARE DESIGNED TO PROTECT

Nature and function of the "Contiguous zones"

The necessarily limited breadth of the territorial sea has not always enabled the coastal State to ensure effective protection of all its interests and this inadequacy of the territorial sea was the determining factor in the development, particularly in this century, of the area known as the "contiguous zone". Now, the juridical nature of this area of sea is quite distinct from that of the territorial sea. Even though at times they appear to be identical in practice or at least difficult to distinguish, the "contiguous zone" is generally a well-defined institution which, legally speaking, cannot be confused with the concept of the territorial sea. Apart from other elements and aspects of the institution which will be dealt with later, its fundamental characteristic is the nature and extent of the rights enjoyed by the coastal State therein. In the "contiguous zone", unlike in the territorial sea, the coastal State cannot exercise full sovereignty but only certain rights or powers to safeguard specific interests. As Gidel has put it, the State enjoyes in the territorial sea all the competence recognized under international law in that area, whereas in the "contiguous zone" it enjoys only certain rigorously specialized types of competence[88]. The reason

---

88. La Mer Territoriale et la Zone Contigüe. Recueil des Cours de l'Académie de Droit International (1934-II) vol.48,p.140

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

for this different juridical nature is that whereas the territorial sea, like the internal waters, forms an integral part of the territory of the State, the "contiguous zone" is an area of the high seas, contiguous to its territorial waters. Accordingly, whereas the territorial sea is subject to the sovereignty of the coastal State, the "contiguous zone" is governed by the principle of the freedom of the seas.

The specialized character of this extension of competence is also due to the fact that its purpose is always the protection of specific interests. Sometimes they are the Customs and excise interests of the State, ot others its security or public health, penal law or any legal and administrative measures that it may have taken with a view to some other interest that also calls for extension of its protection outside the limits of its territorial sovereignty. The establishment of "contiguous zones" is a fairly ancient practice, its first manifestations appearing even before the actual concept of the territorial sea was defined and accepted. However, its acceptance as an intitution of the international law of the sea is relatively new, and, from the standpoint of this study its application for the purpose of protecting the interests of the coastal State in the resources of the sea is even more recent. But before referring to the various forms taken by this latter tendency, let us first see how the general idea of such an area of sea developed and came to be accepted.

Origin and development of the institution; the Conference of the Hague

The British Hovering Acts of the beginning of the eighteenth century provide the earliest proper examples of the "contiguous zone". A series of legislative measures was adopted in Great Britain at different times during the century to check smuggling of various articles and to prevent infringement of Customs and excise regulations. These extended the jurisdictions of the maritime policing of the State to two or more marine leagues, according to what was referred for the effective application of the particular local regulations. In the earliest days of its independence, United States Congress also began to enact laws fixing limits of its jurisdiction for the purpose of suppressing smuggling and the slave trade. Once the concept of the territorial sea was defined and a general consensus prevailed on the marine league rule, Great Britain repealed the Hovering Acts and other measures it had adopted but the United States did not do the same, regarding these extensions of competence as compatible with its acceptance of the marine league rule[89].

89. Cf. Masterson W.E. Jurisdiction in Marginal Sea, (New York, 1929), Part I, Chapt.II, IX and Part II, Chapt. I

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

During the nineteenth century various European countries followed the Anglo-American example. By the time the Conference of The Hague met in 1930 various Latin American States had established zones contiguous to their territorial seas. Just prior to the Conference, States passed from unilateral to collective action. The United States concluded sixteen treaties with other countries during the Prohibition period to establish the distance from the coast within which its authorities could exercise the right of search and detention over foreign ships suspected of smuggling alcoholic beverages. In 1925 eleven States signed a Convention for the same purpose. Thus, when the Codification Conference met there was no doubt at all that a general consensus already reigned with respect to the extensions of State competence in zones of the high seas contiguous to the territorial sea, within certain limits and for specific purposes[90].

As was to be seen in a previous section, the concept of the "contiguous zone" during the discussions at The Hague had an indirect influence on the question of the breadth of the territorial sea and, to a certain extent, conditioned the agreements at the Conference on that point. One of the Bases of Discussion drawn up by the Preparatory Committee of the Conference, envisaged the recognition of this maritime area:

> "On the high seas adjacent to its territorial waters, the coastal State may exercise the control necessary to prevent, within its territory or territorial waters, the infringement of its Customs or sanitary regulations or interference with its security by foreign ships.
>
> Such control may not be exercized more than twelve miles from the coast."[91]

Although the Conference revealed that only a small minority of States objected to recognizing the institution, this was not sufficient to ensure complet agreement, as the majority was divided within itself regarding both the nature of the interests to protect which the State could extent its maritime jurisdiction and the distance within which it could be permitted to exercise such state competence. The main difficulties really arose in connexion with the former, some delegations being in favour of recognizing the institution for fiscal and Customs purposes only, while others wished to do so for purposes of

---

90. In connexion with the unilateral and collective measures referred to, see Gidel, loc.cit., pp.241-273 and for a more detailed statement, Books 3 and 5 of Vol.III of his Droit international public de la mer, Paris 1934; and Jessup, op. cit. pp.75-112.

91. Cf.Acts of the Conference, Doc. referred to in footnote 11, p.171.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

state security, and others again to protect fishing interests. As a result of these differences of opinion the Conference was unable to reach a definition of the "contiguous zone"[92].

Acceptance and subsequent development of the institution

Naturally, the fact that the Conference of The Hague did not succeed in defining the "contiguous zone" did not have the same consequences as its failure to agree on the breadht of the territoO rial sea. Irrespectively of the diversity of opinion on the nature of the interests that this zone was designed to protecte, and the width of the zone, the institution in itself was accepted as lawful by the great majority of the States represented at the Conference. From then on, the aspects on which delegations were divided remained open to discussion, but not the right of the coastal State to extend its jurisdiction to areas of the high seas contiguous to its territorial waters when the protection of certain interests so required. It seemed clear that in the view of the majority the fundamental idea behind these extensions of specialized competence was perfectly consistent with the principle of the freedom of the seas. To that extent, there seems no reason to doubt that, despite the opposition of certain States based on strict interpretations of the principle, the concept of this other area of sea had been accepted in international law.

Practice since 1930 abundantly confirms this impression. A vast number of legal measures has been adopted by States, both unilaterally and collectively, and particularly on fiscal and Customs questions, to ensure the protection of such interests outside their territorial seas. One example is the Anti-Smuggling Act of 1935, empowering the President of the United States to delimit, on certain conditions, zones of the high seas beyond the 12-mile limit from the coast and to allow smuggling to be suppressed therein. The width of the Customs Enforcement Area provided for under the Act varies according to occasion and in direction; seawards, it can extend to 50 miles beyond the 12-mile line from the coast and laterally for a distance of 100 miles on each side, i.e. to a total of 200 miles from the place in which the offence is committed. Similar enforcement areas for the same purpose, though within more modest limits, have been established by other countries; Argentina, Canada, Chile, Cuba, etc. (12 miles); Norway and Yugoslavia (10 miles); Ceylon, Finland and Poland (6 miles). The practice has also grown up of establishing such zones by international treaty; bilateral agreements on the subject are very common. Maritime jurisdiction has also been extended for considerations of neutrality and security, and especially in the latter case, the extension of competence has at times covered a considerable area. Some

92. See Report of the Second Committee, ibid., pp.210-211

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

States have claimed 10 miles, others 12, and in some cases, such as that of Chile, 100 kilometers. Of the extensions of competence for this purpose, the most outstanding are those adopted collectively by the American Republics at the beginning of the second Word War and shortly after it had ended, e.g. the security zone established by the First Advisory Meeting of Foreign Ministers (Panama, October 1939), which at some points reached a breadth of 300 miles, and the zone established by the Inter-American Treaty of Mutual Assistance (Rio de Janeiro, 1947), which includes vast polar, Artic and Antarctic regions[93].

The "contiguous zones" as extensions of the sphere of validity of State competence

The International Law Commission, in the final report submitted to the General Assembly on the regime of the sea, formulated the concept of the "contiguous zone" in the following terms:[94]

"1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

(a) Prevent infringement of its customs, fiscal or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured."

The last part of the paragraph is of course connected with the position adopted by the Commission with respect to the breadth of the territorial sea. The two questions are obviously interdependent for it would be impossible to fix the breadth of a "contiguous zone" independently of that given to the territorial sea, up to whose seaward limit the coastal State enjoys the rights attached to that area. However, the question of the extent of the "contiguous zone" should not be considered solely

---

93. For the texts of the instruments establishing all these unilateral and collective extensions of competence, see United Nations Legislative Series, Laws and Regulations on the Regime of the High Seas (ST/LEG/SER.B/1, Part II).

94. Cf. Report referred to in footnote 17, article 66

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

with that consideration in view; the object which the recognition of this zone of sea is meant to achieve must also be kept in mind. Accordingly, since the purpose of the zone is the protection of certain interests outside the limit of the territorial sea, the State must exercise this right as far as is required for the effective protection of the interest at stake or, at all events, the breadth of the zone should be measured from the seaward limit of the territorial sea, Adoption of either of these criteria would not involve any greater restrictions on the principle of the freedom of the seas than those implied by the recognition of a "contiguous zone" of specified breadth measured from the baseline of the territorial sea. Indeed, it might perhaps be more consistent with practice, which seems to have adopted these criteria, especially in as much as different distances have been fixed for the various interests according to the circumstances in each case.

But the question that concerns this study is that of the juridical nature of the institution. On the basis of our outlines of the practice in the matter, we can now complete the picture of the general concept formulated at the begining of this section. In the first place, is it an extension of the sphere of validity of the laws of a State or is it merely a right to take enforcement measures in the event of infringement of those laws on the State's territory or in its territorial sea? It is this second idea that is conveyed both by the text drawn yp by the preparatory Committee of the Conference of The Hague and by that of the International Law Commission. Were it so, the "contiguous zone" would confer on the coastal State only a right of the same nature as the "right of hot pursuit" which has been recognized precisely in order to enable steps to be taken in the high seas against infringements of a State's laws and regulations committed on its territory. However, the situation in practice is apparently different, since many of these extensions of specialized competence ara rather an extension of the sphere of validity of the particular legal provisions involved. As we saw in the previous section, in such cases, there is no real plurality of territorial seas; the position is rather that the State extends its various types of competence (fiscal or Customs, public health etc.) as far as it thinks necessary to protect the interests involved. Thus the "contiguous zone" can be conceived of in two different ways: in the case just mentioned it can be conceived as an extension of the sphere of territorial validity of certain laws or regulations and, in the previous case, as a simple right of enforcement. Now, in strict legal language, is not the latter right the same thing as an extension of State competence? It is impossible for the State to exercise any right except within a specific sphere of territorial validity. What then is the essential difference, if any, between the sphere of validity, properly speaking, of the legislation of a State and that of its right to enforce its application or observance? In a word, however it may be conceived, the "contiguous zone" always supposes the extension of a specific sphere of validity of a State competence beyond the territorial sea.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

The institution of the "contiguous zone" and fishing interests

When the institution of the "contiguous zone" is considered in connection with interests in fishing, the problem assumes a different form. In the first place, there is no question of a right to take steps to prevent or punish infringements of any legal provisions adopted by the coastal State to regulate fishing activities in its internal or its territorial waters. Such steps can be taken and are in fact taken by the State, but in the exercise of another power, the right of hot pursuit. The question now is that of extending the sphere of validity of such provisions or, as seems to be the most common case, of adopting others eith the same object applicable to a zone of the high seas contiguous to the territorial sea. To put it another way, the right involved is that of protecting and conserving in that zone the interests of the coastal State in marine species. In the second place, since the objects of protection are the resources to be found in the high seas, the interests of the coastal State do not possess tha exclusive quality characteristic of those interests for which the "contiguous zone" was established in the cases so far considered. Accordingly, recognition of the right to protect or conserve these resources will necessarily be conditioned by the interests which the other States have or may or may have in the use and even in the conservation of those resources.

When the Codification Conference met in 1930, these ideas were not sufficiently ripe for the true juridical nature of the "contiguous zone" with respect to fishing to be clearly and precisely defined. Basis of Discussion No. 5, drawn up by the Preparatory Committee of the Conference, envisaged no extension of state competence for such purposes. And the fact that the Conference itself refrained from taking any decision on the actual institution of the "contiguous zone" is evidence of the doubts and differences of opinion prevailing at that time with regard to some of the constituent features of this area of sea, whatever the nature of the interest to which they related. It should, however, be pointed out that the question of fisheries was raised by various delegations during the discussion of the topic. Pursuant to the observations he had made on Dr.Scücking's Report on Territorial Waters, the Portuguese representative, Barbosa de Magalhaes, proposed recognizing the right of the coastal State to establish a "contiguous zone" for the "protection or the supervision of fisheries". His proposal was supported by Henri Rolin (Belgium) who suggested that if it were not possible to accept it as a recognized right at that stage, the idea should at all events be retained in the form of a recommendation. The Icelandic delegation, for its part, stated in a draft resolution that it might be a subject for consideration whether the rules for controlling fisheries in territorial waters could be extended beyond those limits in view of the effects of certain appliances used for catching some species.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

The representative of Denmark also spoke in similar terms regarding the need to protect the fry and young fish. Apart from the general concept emerging from these ideas and proposals, the only point which clearly emerged, and was at times explicitly stated, was that the monpoly over or exclusive exploitation of the resources of the sea was foreign to the purposes for which the establishment of this zone could be permitted.[95]

Froms in which the present trend on the subject appears

As far as the later development of this trend is concerned, it is somewhat surprising to note the relatively small number of States that have actually established "contiguous zones" for fishing purposes, or have proclaimed the right to take steps to protect or conserve the marine fauna outside their territorial waters. This observation is undoubtedly in contrast with the no less evident fact that in recent international conferences, both general and regional, the tendency to vest the coastal State with such powers of protection has grown notably stronger. To round off our general outline of the trend, we may mention the various forms in which it appears, leaving more thorough consideration of them to the chapter on the conservation of the living resources of the sea. The legal instruments claiming the right of protection of conservation for the coastal State do not all conceive of the right in the same terms. In some of them the power claimed is without prejudice to any collective regulations that the State may have agreed upon or may in the future agree upon with the other States concerned, this being sometimes explicitly stated. Other instruments have precisely as their object to give the coastal State an exclusive power of this nature. Thus whereas under the first type of instrument unilateral action may be taken only in the absence of agreement between all the States concerned, under the second group, the right belongs solely to the coastal State. The same modes of expression, though at times with individual shades of meaning, are met with in the positions adopted by States in the organizations and conferences which have recently dealth with the question. And the same is true of the resolutions and drafts approved at these international meetings.[96]

---

95. Cf. Acts of the Conference, Doc. referred to in footnote 11, pp.19, 125, 130 and 193 (Portugal); 134 (Belgium); 142 and 189 (Iceland) and 25 (Denmark). On this question, the Conference went no further than the recognize, in a general recommendation, that the protection of the various products of the sea must be considered, not only in relation to the territorial sea, but also to the waters beyond it and to describe the riches to be thus protected as "constituting the common patrimony"

96. Regarding all these manifestations and modes of expression of the trend in question, see pp.....below.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

As already pointed out, when the institution of the "contiguous zone" is viewed in relation to interests in fishing, the problem does not take the same form as when the protection of other interests of the State in involved. The question therefore is whether, in view of the consideration previously set forth, the term "contiguous zone" should be applied to areas to which the sphere of validity of the coastal State's right of conservation is extended, however this right may be formulated? The formulation of the concept as anunciated at the Conference of The Hague, i.e., that of an exclusive right of protection, naturally presents no doubt whatever. But can the same be said when the coastal State's right is not recognized as a sole right but as one that it may exercise in the absence of agreement with other states concerned and so long as no collective regulations have been established? From the strict legal standpoint there seems to be no doubt here either. Admittedly, such a zone cannot be described as a "contiguous zone" in the strict sense of the term; yet there is no denying that such a right of the coastal State involves an extension of specialized competence enabling it to regulate and control fishing outside its territorial sea. If one likes, it may be described as an extension of specialized competence sui generis but this is easily understood in view of the nature of the interests that are to be protected. In the "contiguous zones" proper, the interest or interests to be protected are solely those of the State, since its right to protect them could not or must not be accorded to any other. On the other hand, when it is a question of the protection or conservation of the living resources the high seas, the coastal State, as will be seen later, cannot claim anything more than a "special" interest. Consequently, the right which it is acknowledged to protect this interest cannot be exclusive or peculiar to it, nor can it be absolute and unlimited as regards the conditions of its exercise. But even when the right is conceived in such terms, there is no reason to deny to the area of sea, over which the sphere of validity of this right of the coastal State extends, the essential character possessed by any "contiguous zone"; nor is there any reason why it should not, as such, be assimilated to that institution of international law in the present state of its development.[97]

---

97. Regarding these considerations, see also pp. below.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

CHAPTER III

THE SUBMARINE AREAS AND THE RIGHT TO USE THEIR RESOURCES

The most important matter to consider in this chapter for the purposes of our study is the nature of the right of the coastal State to use the natural resources, known or yet to be discovered, in the submarine areas adjacent to its territory. Since the right in question is a sole right of use and exploitation, the specific problem of conservation, where really necessitated by the nature of the resource, also comes within the exclusive competence of the coastal State and does not therefore arise at the international level. However, from the latter standpoint, it is of fundamental importance to determine the true scope of this new extension of sovereign competence in relation to the rights which other States enjoy, in accordance with the principle of the freedom of the seas, in the submarine areas and, especially, in their superjacent waters. As we shall see, the question is not merely whether recognition of this right of the coastal State affects the juridical status of these waters, but also to what extent the exercise of the right is conditioned by the fact the freedoms of the sea also apply within the sphere of validity of this sovereign competence. Since technical and scientific factors and socio-economic ones have, of course, intimate bearing on the study and solution of all these questions, and more particularly on some of them, any attempt to evolve juridical structure would be devoid of practical value if it did not take due account of such factors and considerations. It is this point which is dealt with in the first two sections of this chapter.

12. TERMINOLOGY AND DEFINITIONS IN CONNEXION WITH SUBMARINE AREAS

Configuration of the Submerged Land

Generally speaking, land masses -continents and islands- do not rise sheer from the bottom of the sea but rest on a sort of plateau at whose edges begin the great depths which lead to the bottomless ocean. The land masses in fact slope gradually down into the sea till they reach a point where a sharp descent begins. From that point, generally at a depth of 100 fathoms (approximately 200 meters), there is a sharp increase in gradient and this abrupt slope divides the submarine areas in question from the oceanic depths. The breadth of such areas varies. In some places it is very considerable (up to 1000 kilometers or more) but in others it is very narrow or practically non-existent, drop to the oceanic depths occurring practically at the low water mark or tehereabouts. Moreover, though in most cases the bed of the sea has the above characteristics, there are certain irregularities in some parts, particularly with regard to depth.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Scientific Terminology and Definitions

The International Committee on the Nomenclature of Ocean Bottom Features at its meeting at Monaco in 1952 adopted a terminology and certain definitions relating to the submarine areas around continents and islands. According to these, the zone around the continent, extending from the low-water line to the depth at which there is a marked increase of slope to greater depth, is known as the "continental shelf". Where this marked increase occurs, the term "shelf edge" is appropriate. Conventionally this edge is taken at 100 fathoms (or 200 meters) but instances are known where the increase of slope occurs at more than 200 or less than 65 fathoms. When the zone below the low-water line is highly irregular, and includes depths well in excess of those typical of continental shelves, the term "continental borderland" is appropriate. The declivity from the outer edge of the contienental shelf or continental borderland into great depths is termed the "continental slope". By analogy, the declivity which marks the inner margin of the continental bordeland is called the "borderland slope". Finally, the zone around the continents, extending from the low-water line to the base of the continental slope, constitutes the "continental terrace". The same terminology applies to the various submarine areas around islands.[1]

The Three Broad Categories of Submarine Area

On the basis of the foregoing terminology and geological definitions, the submarine areas adjacent to continents and islands can be classified into three broad categories. The first is that of the so-called "continental and insular shelf", or simply "submarine shelf", which is the zone between the low-water mark and the point at which the slope begins a rapid descent to the great oceanic depths, i.e, the solid surface of the seabed out to a point determined by the 100-fathom line. The second is the continental and insular terrace, which is the mass enclosed between the limits of the shelf, the continental slope and an imaginary straight line drawn horizontally from the base of the slope to a corresponding point in the terrestrial sub-soil fo the continent or island. The third category embraces all those submarine areas contiguous to a continent or island whose extension cannot be determined with the same degree of accuracy as in the case of the shelf and the slope because of their

---

1. Cf. Bulletin d'Information de l'U.G.G.I., 2e, Année No. 3, Juillet, 1953. The 100-fathom line, as the Committee itself agreed, is a purely conventional way of marking the edge of the shelf. Other depths, e.g. 250 and 500 fathoms, have been reported as marking new edges or more or less sharp breaks in the slope. See in this connexion Boucart J., Géographie du fond des mers, Etude du Relief des Océans, Paris, 1949, p.127; and Vallaux, C., Géographie générale des mers, p. 39 et seq.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

irregularity and difference in depth. To round off these concepts, it should be added that the geological constitution or features of any of these submarine areas, particularly those in the first two categories, are very similar to those of the adjacent dry land, just as they differ, at times appreciably, from those of the oceanic regions at greater depths.[2]

13. THE NATURAL RESOURCES OF THE SUBSOIL AND SEABED

The submarine areas as a source of wealth

It is only quite recently that the submarine areas contiguous to mainlands and islands have acquired primary importance as a source of wealth. While the exploitation of some minerals, such as coal, iron and even petroleum in the subsoil of the sea, began, as will be seen later, as early as the middle of the last century, until the technical means for more efficient exploitation of the bed of the ocean appeared, the submarine areas and their resources were practically unprospected. The technique of sounding had first to be perfected before the irregularities of the seabed could be appreciated and the use of other modern techniques for the exploitation of these resources could be facilitated. Although neither the scientific investigations so far made nor the exploitation of the resources has yet made it possible to obtain full knowledge of the latter, it has proved possible to realize the extraordinary importance of the submarine areas as a source of wealth.

Petroleum and other resources of the subsoil

While the value of the vegetable and animal wealth of the bed of the submarine areas should not be underestimated, it must be said that what really aroused the marked and growing interest in the exploration and exploitation of these areas was the resources of the subsoil, especially petroleum. After confining itself in its early stage to prospecting and tapping the subsoil on land, the oil industry later extended its activities to the bottoms of rivers and lakes and, to a lesser degree, to the seabed in shallow waters near the coast. Even later, surveys were made at greater depths and further from the coast, with steadily improving results as technique progressed. Though it costs more to prospect for and extract petroleum in submarine areas than on dry land, this fact seems to be amply compensated by the rich profits that the fields already discovered or as yet uncharted are capable of yielding; extraction prospects for submarine petroleum have been estimated at a thousand billion barrels a year. Although based on incomplete data this figure

---

2. On the geological constitution and features of thes submarine areas and the other oceanic regions, see Ommanney, F.D., The Ocean, Chapters I, VI, and VII; Carson, Rachel L., The Sea Around Us, pp. 72 et seq.; and Vallaux,C., op.cit., pp.43-47

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

gives at least an approximate idea of the magnitude of oil reserve s. The subsoil of the submarine areas, moreover, contains other minerals and hydrocarbons capable of being worked or already being worked, such as gas, sulphur, coal; carbon, iron, phosphates and gold, platinum and monacite ore, the latter being rich in thorium which is one of the most valuable elements in the production of nuclear energy.[3]

The vegetable and animal wealth of the seabed

As far as the vegetable and animal wealth of the seabed is concerned, the continental shelf is undoubtedly the submarine area of greatest economic and commercial importance for man, conditions there being much more favourable for marine flora and fauna than in any other submarine area. Its waters are enriched by nutritious salts derived from coastal erosion, silt and chemical and biological decantation, and the sunlight penetrates practically to the bottom. Furthermore, Plankton the staff of life in the sea is abundant and varied on the shelf. Similarly, the ecological conditions and the variety of benthos cause the waters over the shelf to be richest in fish. From the edge of the shelf conditions of life gradually deteriorate as the slope becomes sharper; vegetable life diminishes until at a certain depth it finally disappears and in the same way the marine fauna tapers away to a steadily smaller number of species.[4]

The "benthonic environment"; Sedentary and Moving Species

The vegetable and animal resources of the bed of the shelf and the waters over it and such of those resources as exist on the continental slope and in other submarine areas are extremely varied in nature, this complex of living resources being generally described as the "benthonic environment". According to the conclusions of a Technical Working Group of the Inter-American Specialized Conference on "Conservation of Natural Resources: The Continental Shelf and Marine Waters"(Ciudad Trujillo, March 1956, Doc. 28), the benthos is the aggregation of plants and animals normally associated in the depths of the waters. There may be considered to be three groups in the benthos: (a) those

---

3. Gidel, G., La Plataforma Continental ante el Derecho, University of Valladolid, 1951, pp. 21-27; Azcárraga, J.L. de, La Plataforma Submarina y el Derecho International, Madrid, 1952, pp.27-31. See also Technical Problems of the Exploitation of Minerals in Continental Slopes, technical study by E.M. Thomasson, submitted by the United States delegation to the Inter-American Specialized Conference. On "Conservation of Natural Resources: Continental Shelf and Marine Waters" Ciudad Trujillo, 15 March 1956, Doc. 28).

4. Cf. Finch, V.C. and Treworth, G.T., Physical Geography, p. 505 et seq.; Sverdrup, H.V., Johnson, W. and Fleming, R1H., The Oceans, their Physics, Chemistry and General Biology, New York 1956, p. 771 et seq. See also Mouton, M.W., The Continental Shelf, The Hague 1952, pp. 46-58

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

permanently attached to the bottom; (b) those that walk or crawl on the bottom; and (c) those that float or swim near the bottom. Some organisms may belong to one of these groups at one stage of their lives and to another group at a different stage. Some of the benthonic forms may at times draw away from the bottom. Similarly, some pelagic forms may at times be found near the bottom, but this is not their characteristic habit.[5]

This classification of the benthonic species coincides with the distinctions and definitions of biologists for this part of the marine fauna. One of the fullest and most up-to-date works on the matter defines these concepts as follows: "The benthonic bioma is made up of sedentary, burrowing and moving species. It is hence a heterogenous population living together in order to turn to best account the conditions of life in the same area of sea. The benthonic bioma or more briefly the 'benthos' consists of the entire complex of organisms living in or on the floor of the sea. The term was introduced into science by Haeckel who applied it to the 'formation of life on the sea bottom' consisting of sedentary and mobile species and some nectonic species of benthonic life. It contains a large number of invertebrate species and fishes. These are partly sedentary organisms which settle in the substrata and partly others which can move along the bottom, though slowly, or burrow into it; finally there are also pelagic organisms which are merely temporary members of this community".[6]

In view of the foregoing classification and concepts it will be realized that "benthonic environment" as a whole does not and cannot constitute an "ecological unit", since many of the species comprising it are able to migrate from one ecological system to another and in fact regularly do and are moreover conditioned by physical and chemical factors present in the waters. It therefore appears impossible to maintain, as has sometimes been claimed, that "we cannot think of the benthonic environment or of any ecological unit except in terms of the sum total of the organisms it contains and which are themselves an important factor in that environment, as or more importan than physical and chemical influences and factors".[7] On the contrary,

---

5. Committee I, Continental Shelf, Report of the Working Group, Doc. 86.

6. Popovici, Z., and Angelescu, V., La Economía del Mar y sus Relaciones con la Alimentación de la Humanidad, Buenos Aires 1954, vol. I, p. 338

7. Cf. El Ambiente Bentónico y sus Elementos, statement by José Alvarez del Villar, biologist, of the Mexican Delegation, to Committee I of the Inter-American Specialized Conference, Doc. 46.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

to do so, would be to ignore the vital importance for many of the species of these influences or factors present in the waters, such as the migratory movements due to the temporary absence or presence of certain species in a particular area or to the fact some species are in functional and physiological conditions of life between the maximun and minimum ecological variations of a specific area. In a word, to maintain this thesis would be tantamount to regarding a mere ecological "association" as an ecological "unit".8

Accordingly, in order to determine the species of benthonic fauna that may be properly classed as the resources of the bed of the continental shelf (and of the continental slope and other submarine areas insofar as tehy are tc be found there), a further distinction in the classification given will have to be made according to the physical and biological lik to be observed between each group of species and the bed of the submarine areas. It is thus easy to see that the physical and biological links between the species permanently attached to the bottom (the sedentary, fixed or sessile species) and between some of those that walk or crawl on it (the burrowers) and the bottom are close enough for both to constitute an integral part of the bed of the submarine area in question. The other benthonic species, on the other hand, owing to their pronounced mobility, do not necessarily depend on the bottom or permanently dwell there but belong to the superjacent waters or to the waters occasionally found there. In a few words, of the two main categories into which the benthonic environment may be divided, only the first may be classed as a resources of the sea-bed of the submarine areas.

14. THE LEGAL QUESTION: ITS VARIOUS ASPECTS

The juridical system applying to the exploitation and utilization of the natural resources of the bed and the subsoil of the submarine areas has various aspects which need to be considered one by one. This in no way means that the various legal rules which have been evolved over the last few years have not yet merged into a coherent system or that they can be considered independently of the system of which form part. Nevertheless it will be much easier to study the juridical system and the solution of the various problems it raises if its various aspects at the present time are described and considered separately at the outset. It will be time enough to judge thesystem as a whole when we have seen what developments have taken place in its connexion both nationally and internationally.

---

8. Cf. Ligeras Consideraciones sobre el Ambiente Bentónico y sus Elementos, study submitted by Mr. Luis Howell Rivero, of the Cuban Delegation, to Committee I of the Inter-American Specialized Conference, Doc. 62.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Juridical relation of the submarine areas to the territorial sea

The first of the concepts to which we refer is that of the juridical relation between the submarine areas adjacent to a State and its territorial sea. Physically speaking, these areas begin, as we have already seen, at the low-water mark; i.e. from the point at which the land masses is permanently submerged; this is their landward limit. Juridically speaking, however, the situation is not the same. Under international law, the sovereignty of the coastal State over its territorial sea extends in its entirety to the bed and subsoil of that area, and to the air space above it, the State being entitled to exercise this sovereignty to the same degree over the bed and subsoil of its territorial sea, regardless of the breadth of depth of the submarine area in question. The submarine areas are accordingly of concern to international law only from the seaward limit of the territorial sea. Thus far the submarine areas ara subject to the same juridical regime as the superjacent waters but beyond that limit they are covered by waters which are part of the high seas and therefore subsject to a different juridical regime.

Criteria for determining the seaward limit of these areas

Having fixed the legal boundary of the submarine areas with respect to the territorial sea, we must now determine, again from the legal standpoint, the seaward limit of these areas. Here again, the law need not necessarily coincide with the physical extent of the areas, which in some cases varies considerably owing to the irregularities of the bottom; nor need it coincide with the geological and oceanographical aspects by which it is defined, as these too vary according to the submarine area in question. The 100-fathom line is merely a means of delimiting the continental shelf and even then is accepted only as a conventional measurement of depth. It has moreover the grave disadvantage of excluding the continental slope and hence that part of the continental and insular terrace enclosed between it and the perpendicular line joining the edge of the shelf and the base of the terrace. The "terrace" concept has the advantage of including all the zones going to make up a geological unit and also of being an accurate description of the physical configuration of most submarine areas. Some areas however are still excluded from these concepts, namely those whose irregularity and diversity of depth gives them a configuration different from that of the shelf and the terrace, despite the fact that they are also submarine areas contiguous or adjacent to the land mass of continents and islands. To cater for this element of physical contiguity, recourse must be had to a new criterion which overcomes the difficulty of the irregularity and diversity in depth of these other submarine areas. This criterion is the possibility of exploring and utilizing the natural resources of the bed and subsoil. This is admittedly a technical and economic question, but in the search for criteria for establishing a legal rule on the subject, considerations of

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

this type must carry as much weight as geological ones, especially if there is no incompatibility between them. In fact, the fundamental idea underlying the juridical system applying to the submarine areas is precisely that of the rights that the coastal State must be acknowledged to possess in the matter of exploring and using the resources known or yet to be discovered in those areas.

Nature and extent of the rights of the coastal State

The chief aspect of the legal problem in connexion with the submarine areas is the nature and extent of the rights exercised by the coastal State. This will be readily appreciated if the fact is borne in mind that beyond the seaward limit of the territorial sea, the rights accorded the coastal State are bound to affect the rights and interests of other States on the high seas. That being so, the nature of this extension of State competence must be defined in the light of the purpose for which the rights are recognized. National and international practice in this matter is already clearly established and unanimity reigns on the essential point: namely that the coastal State has sole rights of exploration and exploitation of the natural resources of the bed and subsoil of the submarine areas adjacent to its territory. However the recognition of such rights may have certain direct legal consequences and their exercise by the coastal State may have certain repercussions on the rights enjoyed by other States under the principle of the freedom of the seas. One must therefore see what these consequences and repercussions are before framing the various rules of the legal regime applying to the submarine areas.

Juridical status of the superjacent waters

As far as the consequences are concerned, it will be necessary to specify the scope or consequence of this new extension of the sovereign competence of the State over the waters covering the submarine areas adjacent to its territory, when they do not have the status of a territorial sea. As we saw in the previous chapter, according to the concept of the "epicontinental sea", these waters are assimilated to territorial waters i.e., regarded as an integral part of a marine area equivalent to the territorial sea. But, as will be seen in later sections, the most common trend both in doctrine and practice is opposed to this concept of the waters covering the submarine areas and regards them as preserving, outside the territorial sea, the status of waters of the high seas. The same is held, by analogy, with regard to the air space above these waters. This trend, as will be readily appreciated, is in accord with the nature of the rights which the coastal State is acknowledged to have and with the specific purpose for which they are recognized. It is also easy to appreciate the importance that the adoption of one or the other position will have, especially as regards the immediate consequences for the exploitation of the living resources of the sea to be found in the waters lying above these submarine areas.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Problems connected with the exercise of the rights of the coastal State and other aspects

Nor will it be difficult to realise the repercussions that the exercise of the rights accorded the coastal State over the submarine areas adjacent to its territory may have on the rights of third States. The exploration and utilization of the natural resources of the bed and sub-soil of these areas may, in fact, hamper and even prevent the enjoyment of some of the freedoms accorded under international law to all States in connexion with the various uses to which the high seas are put. In this connexion, it will be necessary to see how far any measures taken by the coastal State or any of its activities in the areas in question may legitimately affect navigation and fishing in the superjacent waters and whether or not the laying and maintenance of submarine cables on the bed of these areas may be prevented. For example, the existence of oil extraction plant, oleoducts, gas pipelines, electric power cables etc., may constitute an obstruction to navigation and fishing and even a grave danger to both or either of them. Where that is so, as in other cases to which the techniques used to explore or utilise the resources of the submarine areas give rise, the two different types of interest and right involved, those of the coastal State and those of the other users of the high seas, will have to be weighed against each other. In other words, certain rules will have to be established to ensure that each of these rights and interests enjoys legal protection commensurate with its legitimacy.

There are other aspects of the legal regime of the submarine areas which should be pointed out before we turn to consider its various practical and territorial manifestations. One of these relates to the installations which the coastal State may sink from the surface of the waters for the surveying of the submarine areas or for the exploitation of their resources, and to any safety zones it may establish to protect the installations. In this connexion it will be necesarry to define the juridical status of such installations, particularly if they are under the direct jurisdiction of the coastal State, and the status of the waters surrounding them or within the safety zone set up to protect them. Another important aspect of this legal regime is that of the delimitation of the submarine areas when they are contiguous to the territories of two or more States whose coasts face each other or when the same submarine area is contiguous to two neighbouring States. In any of these cases it will be necessary to find a criterion for fixing, in the absence of agreement between the States in question these various submarine boundaries between them, at least under normal geographical and geological conditions.

15. NATURE AND EXTENT OF NATIONAL CLAIMS

The earliest national claims

Though the United States Presidential Proclamation of 28

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

September 1945 was the event which brought the problem of the exploitation of submarine areas to the forefront, the first national claims to some of the natural resources of those areas were made much earlier. Sir Cecil Hurst, for example, had already studied some time before Great Britain's claims to minerals won from mines and workings on the sea bed outside the territorial limit. He referred in particular to the Cornwall Submarines Mines Act 1858 which declared that minerals won from mines and workings below the low water mark under the open sea adjacent to but not being part of the County of Cornwall as "part of the soil and territorial possessions of the Crown".9 Also quoted are claims to the so called sedentary fisheries such as the Australian pearl fishery acts, the French and Italian acts relating to Mediterranean coral and the claims of the Bey of Tunis to sponge banks, all made regardless of the limit of the territorial sea of the State concerned.10

The Anglo-Venezuelan Treaty of 1942

The most recent and direct antecedent of the United States Proclamation and of the claims subsequently made by other countries is the Anglo-Venezuelan Treaty of 26 February 1942, under which the United Kingdom and Venezuela fixed the limits of their respective rights "to sovereignty or control" of "parts of the submarine areas of the Gulf of Paria" i.e. with respect to the "sea-bed and subsoil outside of the territorial waters of the High Contracting Parties to one or the other side of the lines A-B, B-Y and Y-X" (art.1). The purpose of the Treaty is not a direct claim to such areas vis-á-vis other States but the mutual recognition of rights of that type "which, have been or may hereafter be lawfully acquired" by the two countries (art. 2). Apart the provisions of article 1, there are other explicit references in the Treaty to the regime applying to the superjacent waters. According to article 6, "Nothing in this Treaty shall be held to affect in any way the status of the waters of the Gulf of Paria or any rights of passage or navigation on the surface of the seas outside the territorial waters of the Contracting Parties." It emerges from these provisions that the actual and potential claims made under the Treaty are confined solely to the bed and subsoil of the submarine areas between the Island of Trinidad and the Venezuelan coast and do not otherwise affect the waters covering those areas outside of the territorial waters of each of the Contracting Parties.11

United States Proclamation of 1945

The United States Proclamation of 1945 is of the same nature

---

9. "Whose is the Bed of the Sea", the British year book of International Law 1923-1924, Vol.IV, pp. 4 et seq.

10. Cf. Fulton, T.W., The Sovereignty of the Sea, New York 1911, pp. 697-698.

11. League of Nations Treaty series, Vol. CCV, No.4829, pp.121-127

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

and scope, stating in one of its relevant sections that "Having concern for the urgency of conserving and prodently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea-bed of the continental shelf beneath the high seas but contiguous to the coast of the United States as appertaining to the United States, subject to its jurisdiction and control." Aside form the internal aspect and repercussions of this claim, its international aim is clear and unambiguous, namely, to proclaim an exclusive right of jurisdiction and control for purpose of conserving and utilizing the natural resources of the bed and subsoil of the submarine area in question. The Proclamation, like the Anglo-Venezuelan Treaty, does not affect the superjacent waters, regarding which it also declares explicitly that "The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected."[12]

Other claims showing the same trend

Most of the national claims subsequently made are for the same and sole purpose as the Anglo-Venezuelan Treaty and the United States Proclamation.[13] This is true of the claims made by Iran, Saudi Arabia and nine sheikhdoms of the Persian Gulf, the object of which is to proclaim the sole right of the coastal State to explore and exploit the natural resources, and especially the mineral wealth of the bed and subsoil of adjacent submarine areas, and all of which explicitly declare that assertion of this right in no way affects or changes the status of the waters over the areas claimed. The claims of Australia the Phiplippines, India and Pakistan are also directed slely towards the natural resources of the bed and subsoil of the submarine areas adjacent to their respective territories. The same is true of the United Kingdom Orders in Council concerning the Bahamas, Jamaica and other British Possessions and territories. The more recent proclaimation of the Government of Israel declares the sea-bed and subsoil of the submarine areas contiguous to the coasts of Israel, and outside the territorial waters to the extent that the depth of the superjacent waters admits of the exploitation of the natural resources of those areas, to be included in the territory of the State of Israel. The second paragraph of the same instrument, likewise specifies that the claim shall in no way "affect the character as high seas of the waters as are above the said submarine areas and outside the territorial waters of Israel".

---

12. Cf. Department of State Bulletin, 30 Sept., 1945, p. 484.

13. Except where otherwise indicated, /the Spanish text/ of the legal instruments referred to in the following passages is to be found in the Appendix to the work of Azcárraga, p.251 et seq., and/the English in "Laws and Regulations of the Regime of the High Seas", United Nations Legislative Series ST/LEG/SER.B/1, 11 January 1951, Vol. I, Part.I.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

The Portugesse legislation on the subject adopts also the trend of these claims through the following original formula: "The exploitation of the continental shelf will not impose on the regime of the high seas of the epicontinental waters, limitations other than those authorized by international law."14

Some Latin-American claims show the trend already observed. The brazilian Decree of 8 November 1950 subjects its continental and insular shelf to the exclusive jurisdiction and dominion of the Federal Union and reserves for the latter the right of utilization and exploration of products or natural resources of that part of the national territory. The Decree also states that the rules governing navigation in the waters covering the continental shelf shall continue in full force without prejudice to any further rules that may be made, especially as regards fishing in that area. The legal instruments of other American republics which can be taken as coming in this group are not so explicit with regard to the status of the superjacent waters but are no less precise and unambiguous regarding the object of the claim. The Guatemalan Petroleum Law, enacted by Legislative Decree of 30 August 1949, does no more than claim all deposits or natural reserves of petroleum in the continental shelf, and the Constitution of 1956 likewise regards only the continental shelf as part of the dominion of the nation.15 The Nicaraguan Constitution of 1950, re-enacting a previous constitutional provision, simply refers to the continental shelf and the submarine terraces. That of the Dominican Republic of 1954 reserves for the States "the right of ownership in and utilization of the natural resources and walth which occur or may be discovered in the sea-bed or subsoil of the sea.16

Nature and scope of the claims of Mexico and Argentina

The claims made by the other American Republics which have constitutional or legislative provisions on the matter or have issued unilateral or joint declarations, depart considerably from the trend evident in those so far considered. This is clear, in the first instance from the claims of Mexico and Argentina. On 27 December 1945, the Mexican Executive, re-

---

14. The text of the Indian Proclamation is to be found in the Gazette of India, Extraordinary, Part 11, Section 3, August 30, 1955; that of the Israeli Proclamation in UN Doc. A/CN. 4/99/Add. 1, p. 15; and the Portuguesse Law No. 2080 in the Diario do Governo, of 21 March 1956 (I Série, Numero 60)

15. Cf. Art. 30, Constitution of the Republic of Guatemala, decreed by the National Constituent Assembly of 2 February 1956. (Guatemala, C.A., 1956).

16. The Full text of this Dominican Constitutional provision is given in document A/CN.4/99, p. 22. Regarding the recent Venezuelan Act on the subject, see footnote 39 below.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

affirming and expanding the Presidential Declaration of the previous year, proposed a revision of Article 27 of the National Constitution to the effect that "direct dominion over the continental shelf and the submarine terraces belongs to the nation..., the waters of the seas over the continental shelf and submarine terraces are also the property of the nation..." The Argentinian claim is of like scope though not framed in the same terms. The continental shelf and the sea above it having first been declared "temporary zones of mineral reserves" under a Decree of 1944, under a new Decree of 11 October 1946 the epicontinental sea and the Argentinian continental terrace were declared "subject to the sovereignty of the nation", the Decree going on to state that "for purposes of free navigation, the character of the waters situated in the Argentinian epicontinental sea and above the Argentinian continental shelf remains unaffected by the present Declaration". As can be seen, neither the proposed revision of the Mexican Constitution nor the second Argentinian Decree affect the freedom of navigation in the "epicontinental" waters. The same is not ture of the freedom of fishing in this area of sea, however, since the object and immediate consequence of the claim is to reserve for the coastal State exclusive exploitation of the riches of the sea-bed and subsoil of these submarine areas and of the living resources to be found in the superjacent waters.

Position of the countries on the South Pacific seaboard

The claims of the three American republics of the South Pacific seaboard depart even further, in other aspects at least, from the trend which brought the doctrine of the continental shelf into international practice. We have in mind the way in which this doctrine in the claims in question, as seen in the previous chapter, in linked with the 200-mile maritime zone. In the unilateral measures adopted by these three countries and in the joint instruments they signed, the appropriation of the continental shelf or the sea-bed and subsoil of the adjacent sub-marine areas is not exactly the direct object of the claim but rather a consequence of the extension of State competence over this broad area of sea. This is due not only to the fact that the region in question is one where the adjacent submarine areas, by reason of their configuration and especially in view of the depthof the bottom, cannot always be regarded as on the same footing as the continental shelf or terrace but also to the circumstance that the primary purpose of the claim is the exploitation and conservation of the living resources of the sea, and only to a lesser degree or indirectly, of the resources of its bed and subsoil. For this reason, the original Decrres issued by Chile (23 June 1947) and Peru (1 August 1947) explicity referred to a "continental shelf whatever the depth and extension of this shelf may be". In the joint Declaration of Chile, Ecuador and Peru signed at Santiago on 18 August 1952, the claim to these adjacent submarine areas appears only as a consequence

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

of a proclamation of maritime sovereignty. According to paragraph 3 of the Declaration, "exclusive sovereignty and jurisdiction over the (200 mile maritime) zone also includes exclusive sovereignty and jurisdiction over the sea-bed and subsoil."17

The other Latin-American claims

The position of the other four Latin-American countries which have made such claims coincides with one or other of those just described and in some cases with both. Panama, in its 1946 Constitution, confined itself to proclaiming state ownership of the submarine continental shelf which appertain to the national territory but in its Decree of 17 December of the same year, it extended national jurisdiction over the territorial waters of the Republic for the purposes of fisheries in general to all the space above the sea-bed of the submarine continental shelf, and for that reason product of any fishing within the limits indicated is considered a "national product". The similarity between this claim to the resources of the sea and the Mexican constitutional amendment is obvious. The Government of Costa Rica in its first Decree (1948) on the subject proclaimed national sovereignty in the whole continental and insular shelf, "at whatever dept it is found....", over "the seas adjacent to the continental and insular coasts of the national territory, whatever their depth, and to the extent necessary to protect, conserve and utilize the natural resources and wealth which exist or shall come to exist on, in or under said....", and"the protection and control of the State over all the sea included within the permimeter formed by the coasts and by a mathematical parallel, projected out to sea at a distance of 200 nautical miles from the continental Costa Rican coasts". This Decree was amended by another, issued a year later, in which the term "national sovereignty" in the article where it was applied to the "adjacent seas" was replaced by the term "rights and interests of Costa Rica". The term "control" is also missing from the last-named provision, by which the 200-mile maritime zone is reduced to an extension of competence for the purposes of protecting or conserving the living resources in that zone. Costa Rica nevertheless signed at Quito in 1955 the Protocol of Accession to the Maritime Zone Declaration of Santiago and, accordingly, that part of the Declaration proclaiming the exclusive jurisdiction and sovereignty of the State over the sea to a distance of 200 miles and over the sea-bed and subsoil beneath it 18.

---

17. For the Spanish text of the Santiago Declaration see Revista Peruana de Derecho International (1954) vol.14, p.104. An English translation is to be found in the Yearbook of the International Law Commission 1956, vol.I, pp. 169-170

18. Concerning the Protocol of Accession to the Santiago Declaration see page... above.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

The other two American Republics concerned are Honduras and El Salvador. The first has made two types of claim. In 1950 it amended its Constitution to declare part of the national territory the submarine platform or continental and insular shelf, and the waters which cover it, at whatever depth it may be found and whatever its extent may be, and to declare full, inalienable and imprescriptible dominion over all the resources which exist or may exist in that submarine area and in the superjacent waters. As can be seen, this Constitutional amendment is based on the claims of Mexico and Argentina regarding the "epicontinental" waters and of that of the countries of the South Pacific seaboard as far as the basis for fixing the seaward limit of the submarine areas is concerned. El Salvador's claim, on the other hand, is more similar to the second of the two, and introduces a new variation regarding the air space over the maritime zone, for under its 1950 Constitution, the national territory includes the adjacent seas to a distance of 200 sea miles from the low water line and the corresponding airspace, subsoil and continental shelf.

16. POSITION OF THE INTER-AMERICAN ORGANIZATIONS AND CONFERENCES

The political organs of the United Nations have no occasion to state their position regarding the nature and extent of the rights which the State may claim with regard to its submarine areas. As pointed out in the Introduction, consideration of all the problems relating to the sea was deferred until the eleventh session (November 1956) of the General Assembly. The position in the Organization of American States is different however, these problems having been considered on various occasions, on some of which statements bearing on the substance of the question have been made. We will therefore see what took place on each of them, in order, the Second Meeting of the Inter-American Council of Jurists (Buenos Aires, 1953), the Tenth Inter-American Conference (Caracas, 1954), the Third Meeting of the Council of Jurists (Mexico, January 1956) and the Inter-American Specialized Conference (Ciudad Trujillo, March 1956).

The first studies and decisions on the subject

The Inter-American Council of Jurists at its first meeting (Rio de Janeiro, 1950) had entrusted to its Permanent Committee, the Inter-American Juridical Committee of Rio, the study of the question "System of Territorial Waters and Related Questions", under the plan adopted to promote the development and codification of international law[19]. Pursuant to this, the Committeee

---

19. See my Report on the first meeting of the Inter-American Council of Jurists (Habana, 1950), pp.101-103

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

prepared a draft convention consisting of five articles together with a brief statement of reasons. Article 1 states that: "Present International Law recognizes the coastal State exclusive sovereignty over the soil, sub-soil, waters and aerial and estratospheric space of the continental shelf, and that said exclusive sovereignty is excercised without any condition of real or virtual occupation." And according to Article 2, "The signatory States likewise recognise the right of each one to fix a zone for the protection, control and economic exploitation, up to a distance of 200 nautical miles, measured from the law-water mark of their coast and of ther insular possessions, within which they can excercise military, administrative and fiscal vigilance over their respective territorial jurisdiction."20 As can be seen, the draft took over and combined two of the types of claim already made by certain Latin-American countries.

After considering the Draft Convention at its Second Meeting, the Council of Jurists decided to return the topic to the committee "for the continuation of its study", according to the procedure established in the general plan adopted at its previous meetings. In reaching this decision, however, the Council also considered certain substantive proposals designed to give some guidance to the Committee. The first of these proposals came from the Sub-Committee entrusted with consideration of the question. The relevant paragraphs, couched in the form of consideranda ran as follows:21

> "1. That several American countries have passed laws and issued declarations in which they proclaim and lay claim to rights over the continental and insular shelves of their countries and over their adjacent waters;
>
> "2. That without expressing, for the present, any opinion on the various criteria on which those laws and declarations are based, (the Council notes that) they affirm the basic principle that riparian States have the right to protect, conserve and promote the natural riches of those zones as well as to ensure for themselves the use and

---

20. The draft was signed by four members of the Committee: J.R. Bonastre(Argentina), F.A. Arsúa (Mexico), Osvaldo Vial (Chile) and Mariano Ibérico (Peru). The other members present a dissident opinion: F. Campos (Brazil), J.J.Caicedo Castilla (Colombia) and B.Ch. Cwmes (United States). Cf. Inter-American Juridical Committee, Draft Convention on Territorial Waters and Related Questions, Pan-American Union, Washington, D.C. Sept. 1952.

21. Cf. draft resolution submitted by Sub-Committee 2 to Committee No. III, Doc. 62, Rev. 1.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

benefit thereof, a principle which it regards as legally established."

The scope of these consideranda is not difficult to see. Both refer to the submarine shelf and to its "adjacent waters", acknowledging a right of the riparian State to protect, conserve and promote the riches of those zones and also "to ensure for themselves the use and benefit thereof". Thus the Sub-Committee and, at all events, enunciated as a "legally established" principle an expression of the doctrine of the continental shelf to which only a limited number of Latin American countries had adhered.

During the discussion, the representative of Cuba made some observations and submitted and amendment to paragraph 2 of the Sub-Committee's draft resolution. The text of the amendment was as follows:[22]

> "That, without expressing, for the present, any opinion on the nature and scope of claims that riparian States may make to the continental and island shelves and to the their adjacent waters, it is an obvious fact that the devolopment of technical methods for exploring and exploiting the riches of the sea has made it necessary for international law to confer on those States certain rights for the protection, conservation and development of these riches, as well as to ensure the use and benefit thereof."

When introducing the amendment, we began by agreeing that the traditional principles of the international law of the sea needed revising in the light of the new needs interests created by the development of techniques for the exploration and exploitation of the resources of the sea. We added, however, that in this process of revision, it was impossible to acknowledge the riparian State to possess the same rights, regardless of the nature of the resources or of the zones in which they were to be found. In that connexion a distinction had to be drawn, as was already done in prevailing doctrine and practice, between the riches of the sea-bed and subsoil of the continental and insular shelf and the living resources of the sea, when they were outside the territorial sea of the State. As it was the Sub-Committee's intention to cover all resources and all marine areas, the only right of the riparian State that could be recognized in their respect was that of protecting, conserving and promoting them and ensuring (but not for themselves alone) the use and benefit thereof. In that way, the special interest that the said State might have in such riches was recognized and safeguarded without the interest and rights of other States being thereby ignored[23].

---

22. Cf. Amendment proposed by the Cuban delegation to the draft resolution submitted to Commission No.III by Sub-Committee 2, Doc. 75

23. See Record of the Fifth Meeting of Committee III, Doc. 78 COM.III/19.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

When the Sub-Committee's draft resolution was put to the vote, paragraph 2 did not obtain the requisite majority.[24] Since the Cuban amendment had been withdrawn, there remained no alternative but to abandon the idea of making any statement on the substance of the subject or to find a formula that would be acceptable to the Council. The first course might give the impression that the Council had refused to admit the validity of any type of claim by the riparian State, which, of course, was far from the case. The second course depended on whether it would succeed in evolving a formula giving expression to all or some of the new principles on which a general consensus already prevailed. With this latter aim in view, the representatives of Cuba and Mexico submitted the following text to the plenary meeting of the Council:[25]

> "That, without expressing, for the present any opinion on the nature and scope of the claims that riparian States may make to their continental and island shelves and to their territorial waters, it is an obvious fact that the development of technical methods for exploring and exploiting the riches of these zones has had as a consequence the recognition by international law of the right of such States to protect, conserve and promote these riches as well as to ensure for themselves the use and benefit thereof".

Introducing the joint proposal the Cuba representative explained that before drafting it its authors had consulted almost all delegations to sound the general geeling of the Council on the question. The new next accordingly contained a formula reconciling and combining the various views expressed in the course of the debate. The Mexican representative also made a statement emphasizing that "the amendment under consideration by the Council is not designed to include, and does not in any way include, the waters over the continental shelf when they are not part of the territorial sea. On the other hand, the waters of the territorial seas themselves are included in the terms of the proposed amendment, without the latter however attempting to solve the

---

24. Decisions of the Council require an absolute majority of eleven. The voting on this paragraph was as follows: 6 for, 2 against and 7 abstentions. Cf. Report by the Rapporteur of Committee No.III (Doc.42, Suppl. 1, Corr.1, COM.III/9, p. 3).

25. Cf. Draft amendment on Territorial Waters and Related Questions, submitted by the delegations of Cuba and Mexico, Doc. 62, Rev. 2, Add. 1

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

problem of the breadth of the territorial sea which, like the problem of the non-territorial waters over the shelf, remains open pending further study by the Inter-American Juridical Committee and the Council itself"[26].

The question now presented no difficulty. There was no longer any reference in the new text to "adjacent seas" nor, consequently, to the claims the riparian State might make on those maritime zones and on the living resources to be found in them. On the other hand, reference was made to "territorial waters", i.e. to the territorial sea of the State, where the latter could, in accordance with international law, ensure for itself the use and benefit of the reaches of the sea. Mention was also made of the submarine shelf, as sea-bed and subsoil, and of the natural resources to be found there, with respect to which both doctrine and contemporary practice recognized the right of the riparian State to exclusive exploitation. This distinction being made, it would be possible in future to determine what other rights should be recognized as belonging to the riparian State in zones contiguous to its territorial sea, either on the ground that they were "epicontinental" waters or on some other grounds. In view of all these considerations, the joint proposal of Cuba and Mexico won the almost unanimous approval of the Council[27].

The resolution of the 10th Inter-American Conference (Caracas, 1954)

At the Caracas Conference the problem of the continental shel was formulated in very similar circumstances. The programme of the Conference included an item entitled "Conservation of Natural Resources: Continental and Insular Submarine Shelf and the Waters above it". The delegation of Ecuador, responsible for the inclusion of the item in the Conference agenda, submitted a draft recommendation, the pertinent part of which was as follows:[28]

---

26. Cf. Record of the Fourth Plenary Meeting, Doc.100,SP/21, pp. 14-15.

27. In the voting, only Panama and Uruguay abstained; the United States delegation voted against, as in its opinion, the Council had not considered the subject thoroughly enough to make a statement of such scope. Cf. Record of the Fourth Plenary Meeting, pp. 16, 17 and 19.

28. Cf. Doc. 150, SG-94.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

"That the sovereignty and jurisdiction of each of the American riparian States shall extend to the submarine continental and insular shelf off the continental and insular coasts of their territories, regardless of the depth of the ocean above the said shelf, and to the existing natural resources or those that may be discovered therein and in the waters above it.

That such national sovereignty and jurisdiction shall include an area of two hundred marine miles, reckoned from the outermost points of the coast, as the most adquate means of preserving and facilitating the conservation and utilization of the natural resources of each State.

That, consequently, it shall be the duty of the riparian State to supply the legal, regulatory, and technical measures for the conservation and prudent utilization of the natural resources now existing or those that may be discovered in the said areas under its sovereignty, for its own benefit, the benefit of the himisphere, and the community of nations."

It is not difficult to see why the Ecuadorian proposal placed the Conference in a situation analoguous to that which had confronted the Council of Jurists in Buenos Aires in connexion with the Sub-Committee's proposal. The draft recommendation, within one and the same juridical system, embraced the various aspects of the utilization and conservation of the resources of the sea. But it also linked the concept of the submarine shelf proper with that of another area of sea: the 200-mile maritime zone, over which national sovereignty and jurisdiction likewise extended. Finally the draft presented the other characteristic features of some of the types of claim considered in the previous section.

Basing itself on the same considerations that it had advanced at Buenos Aires the Cuban delegation formally proposed to the Conference to refrain from passing judgment on the various questions raised in the Ecuadorian draft and at the most to make a statement in the same terms as that uttered by the Inter-American Council of Jurists.[29] The question was referred to a special

---

29. The Cuban proposal was simply to delete the above-quoted paragraphs from the draft of the Ecuador delegation and reaffirm the Buenos Aires declaration in their place. Cf. Amendments of the Cuban delegation to the draft recommendations (Doc. 150), submitted by the delegation of Ecuador Doc. 400, Com.II-27

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

working group which considered the various proposals at a number of meetings in the light of the legislative trend in the hemisphere and of the views expressed within the Committee. The result of its deliberations was that the working group considered it inadvisable for the Conference to take up a position on any of the questions relating to the exploitation and conservation of the resources of the sea. The subject was under study by Inter-American legal bodies and, what was more, its economic and scientific aspects called for a consideration for which the necessary data were then lacking. Thus, the Conference should confine itself to pointing out the consequences of technical development in the means of exploring and exploiting the riches of the shelf and the waters of the sea and to reaffirming the interest of the American States in the national declarations or legislative acts on the question and in the adoption of measures for the conservation and prudent utilization of those resources. The resolution approved by the Conference reproduces these ideas in the relevant section.[30]

As pointed out in the introduction, under the same resolution LXXXIV, the Inter-American Specialized Conference was convoked "for the purpose of studying as a whole the different aspects of the juridical and economic system of governing the submarine shelf, oceanic waters, and other natural resources in the light of present-day scientific knowledge"; and the pertinent inter-American organizations were resquested to render necessary co-operation in the "preparatory work" that the said Specialized Conference required. In pursuance of this latter part of the

---

30. The text of the relevant paragraphs is as follows: Whereas: ... It is an obvious fact that technical development concerning the means of exploration and exploitation of the wealth of the submarine shelf and waters of the sea has resulted in the States' proclaiming the right to protect, conserve, and develop these resources as well as to ensure their use and benefit;... Reaffirms: 1. The interest of the American States in the national declarations or legislative acts that proclaim sovereignty, jurisdictions, control, or rights to exploitation or surveillance to a certain distance from the coast, of the submarine shelf and oceanic waters and the natural resources which may exist therein. 2. That the riparian States have a vital interest in the adoption of legal, administrative, and technical measures for the conservation and prudent utilization of the natural resources existing in, or that may be discovered in, the areas mentioned, for their own benefit and that of the Continent and the community of nations; Cf. Final Act, Tenth Inter-American Conference, Caracas, 1954, Resolution LXXXIV, Pan-American Union, Washington, D.C.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

resolution, the Council of the Organization of American States asked the Inter-American Council of Jurists to undertake the preparatory study on the legal aspects of the question.31 The Council of Jurists held its Third Meeting on the eve of the Specialized Conference and made certain statements on the subject dealt with in this section. Before considering them, however, we should mention another antecedent also related to the position collectivelly adopted by some Latin-American republics on the subject. We have in mind the "Declaration of Antigua Guatemala" approved by the Organization of Central American States (ODECA) on commencing its labours in August 1955. This instrument states, inter alia:

> "8. Its purpose to defend the territorial, economic and cultural patrimony of the Central American States, including in the first place the continental shelf and the territorial and epicontinental seas, in order that their utilization may promote the total betterment of its people."32

The Third Meeting of the Inter-American Council of Jurists (Mexico, January 1956)

Among the statements made by the Inter-American Council of Jurists at its Third Meeting is one referring specifically to the legal regime of the continental shelf and another which has an indirect bearing on the nature of the superjacent waters. Regarding the latter, resolution XIII adopted at the meeting, in one of the parts considered in the previous chapter, included "geological and biological factors" amongst those which the coastal State might take into account in fixing the breadth of its territorial sea. As we pointed out at the time, the inclusion for the purpose of these two factors, and the first especially, could only mean that the seaward limit of the territorial sea was linked with the limits of the submarine areas beneath them (i.e. in the case of resolution XIII, the submarine shelf and continental terrace corresponding to the coastal State). The purpose of this linking seems obvious and at all events was made clear in the statements of some of the sponsors of the

---

31. On the preparations for the Specialized Conference up to 4 January 1956, see Information Document of the Secretariat of the Council of the OAS, Doc. C/INF-224 Rev.

32. Final act of the first meeting of the Ministers of Foreign Affairs of the Central American Republics, held in the city of Antigua Guatemala, from 17 to 24 August 1955, Doc. I-RMRE/G.26, pp. 0-10

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

resolution. The Mexican representative, for instance, drawing an analogy with the principles governing the part of the territory of the State on dray land maintained that

> "these principles ara that the State exercises sovereignty not only over the bed and subsoil but also over the fluid media to be found above that territory, i.e. over the waters and the atmosphere. In accordance with this line of thought, the waters covering the continental shelf are subject to the sovereignty of the coastal State. This undoubtedly makes it possible to solve the problem of the breadth of the territorial sea from a legal standpoint. The territorial sea may have the extent of the continental shelf it covers."33

The part of resolution XIII referring directly and concretely to the legal system applying to the continental shelf is sufficiently explicit to make quite clear the position adopted on that occasion by the Council of Jurists. According to the resolution:34

> "The rights of the coastal State with respect to the sea-bed and subsoil of its continental shelf extend also to the natural resources found there, such as petroleum, hydrocarbons, mineral substances, and all marine, animal, and vegetable species that live in a constant physical and biological relationship with the shelf, not excluding the benthonic species."

Independently of the scientific aspect involved by the reference to species that "live in a constant physical and biological relationship with the shelf" and more especially the concept of the "benthonic species" implicit in it, the purpose and scope of this part of resolution XIII are clear and unambiguous. The rights enjoyed by the coastal State over the sea-bed and subsoil of the continental shelf extend to all animal or vegetable species that live in relationship to it in the manner and to the degree stated in the resolution. Without referring to rights over the "epicontinental" waters, the resolution claims for the coastal State all the living species which, according to the concepts formulated at the beginning of this chapter, "are normally associated with the bottom of the waters", or any other species coming within the general category envisaged and defined in the text.

---

33. Cf. Inter-American Council of Jurists, Acts and Documents of the Third Meeting, Pan-American Union, Washington, D.C. 1956, p.116

34. Ibid. page 430.The text of resolution XIII is also referred to in footnote 40 to the previous chapter.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Position of the Inter-American Specialized Conference (Ciudad Trujillo, March 1956).

The conclusions reached by the Specialized Conference which met at Ciudad Trujillo differ in tenor. In the first place, on the question just referred to, it stated that: "Agreement does not exist among the States here represented with respect to the juridical regime of the waters which cover the said submarine areas nor with respect to the problem of whether certain living resources belong to the sea-bed or to the superjacent waters."[35] Thus, as with respect to other questions on which the Council of Jurists had made statements, the Conference did not act on resolution XIII. However, in the matter of the general juridical regime applying to the sea-bed and subsoil of the submarine areas, it went further than a statement on the above lines and succeeded in formulating a positive conclusion in the following terms:

> "The sea-bed and subsoil of the continental shelf, continental and insular terrace, or other submarine areas, adjacent the coastal State, outside the area of the territorial sea, and to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil, appertain exclusively to that State and are subject to its jurisdiction and control."

Though we shall be returning to this question, we must point out forthwith that the formula adopted at Ciudad Trujillo is designed to place all coastal States on an equal footing with respect to the submarine areas adjacent to their respective territories. As we saw at the beginning of the coast of continents and islands is sometimes so irregular that it cannot be defined in terms of the shelf or terrace concept. When this is so, as in the case of some countries in the American continent and elsewhere, the coastal State may exercise the same exclusive rights now enjoyed by those which have a continental or insular shelf and terrace, provided the depth of the superjacent waters admit of the exploitation of the natural resources of the sea-bed and subsoil and that the submarine area be adjacent to the territory of the coastal State.

---

35. Cf. Final act of the Inter-American Specialized Conference on "Conservation of Natural Resources: Continental Shelf and Marine Waters", Pan-American Union, Washington, D.C. 1956.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

17. THE INTERNATIONAL LAW COMMISSION'S DRAFT

The study of the "continental shelf" was one of the first undertaken by the International Law Commission as part of the general topic of the "Regime of the high seas". After preparing, at its third session (1951), a first draft, which was submitted to governments, it drew up a new draft at its fifth session (1953), on the basis of their comments. At its eighth session (1956), when preparing its final report to the General Assembly pursuant to resolution 899 (IX), it considered the question once again and made some changes in the text approved in 1953. To facilitate consideration of the final draft, the text is reproduced below.[36]

Text of the 1956 Draft

Section: III CONTINENTAL SHELF

Article 67

For the purpose of these articles, the term "continental shelf" is used as referring to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres /approximately 100 fathoms/ or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas.

Article 68

The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources.

Article 69

The rights of the coastal State over the continental shelf

---

36. Cf. Report covering the work of its eighth session, General Assembly Official Records: Eleventh Session, Supplement No. 9 (a/3159). The numbering of the articles corresponds to the the general draft on the Law of the Sea submitted by the Commission to the Assembly. The 1951 draft is to be found in the report covering the work of that year (Doc. a/1858) pages 23-25, and the 1953 draft in the report covering the work of its fifth session (Doc. A/2456), pp.13-17.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters.

Article 70

Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables on the continental shelf.

Article 71

1. The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea.

2. Subject to the provisions of paragraph 1 and 5 of this article, the coastal State is entitled to construct and maintain on the continental shelf installations necessary for the exploration an exploitation of its natural resources, and to establish safety zones at a reasonable distance around such installations and take in those zones measures necessary for their protection.

3. Such installation, though under the jurisdiction of the coastal State, do not possess the status of islands. They have not territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.

4. Due notice must be given of any such installations constructed, and permanent means for giving warning of their presence must be maintained.

5. Neither the installations themselves, nor the said safety zones around them may be established in narrow channels or where interference may be caused in recognized sea lanes essential to international navigation.

Article 72

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite to each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the baselines from which the width of the territorial sea of each country is measured.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from which the breadth of the territorial sea of each of the two countries is measured.

Article 73

Any disputes that may arise between States concerning the interpretation or application of articles 67-72 shall be submitted to the International Court of Justice at the request of any of the parties, unless they agree on another method of peaceful settlement.

As can be seen, while the articles do not cover all the aspects of the subject, the certainly deal with all the questions of importance raised by the right of the coastal State to the exclusive exploitation of the natural resources of the submarine areas adjacent to its territory. We will consider these questions one by one in the order in which they appear in the articles.

Submarine areas covered by the draft

Article 67 indicates the sense in which the term "continental shelf" is used in the draft. In its first draft (1951), the Commission employed the same term to designate "the sea-bed and subsoil of submarine areas contiguous to the coast, but outside the area of territorial waters, where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil". On that occasion the Commission considered that the establishment of a fixed limit for the continental shelf would have the disadvantage of instability, seeing that "technical development in the near future might make it possible to exploit resources of the sea-bed at a depth of over 200 metres". At its fifth session (1953), it abandoned the criterion of exploitability underlying its first draft in view of the comments of some governments and of the consideration that the 1951 text was not specific enough and might give rise to uncertainty and disputes. In its opinion, the depth limit of 200 metres was sufficient for all practical needs then, and probably for a long time to come too. In the light of these and other considerations, it accordingly defined the shelf in its second draft on the basis of the criterion of the 100-fathom (200 metres) line considering that "the unavoidable element of arbitrariness" contained in the new text could be mitigated by introducing equitable modifications in special cases in which the submarine areas presented the characteristic features of the continental shelf. 37

37. See the Commission's two reports (1951 and 1953 respectively referred to in the previous footnote.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

At the Commission's eighth session, on the basis of the conclusions reached by the Inter-American Specialized Conference of Ciudad Trujillo on the point, we proposed amending the 1953 text of article 67 to read as follows: "As used in thses articles, the expression 'submarine areas' refers to the soil and subsoil of the submarine shelf, continental and insular terraces, or other submarine areas adjacent to the coastal State outside the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of thesaid areas". Our reasons for supporting the formula of the Inter-American Conference have already been set out in the earlier sections of this chapter. The criterion of the 100-fathom line would exclude from the definition a considerable part of the continental and insular terraces and also any other submarine area adjacent to a States territory which had a configuration different from that of the latter two areas but whose natural resources were already being exploited, as in the case of Chile, or were liable to be exploited in the very near future. Adoption of this amendment would avoid the system of ostensible inequality which strict application of the formula approved by the Commission in 1953 would involve. From the standpoint of terminology, it was also clear that the generic term "submarine areas" was better suited than any other, since it would cover the sea-bed and subsoil of the different areas in which the coastal State was acknowledged to have existing or potential rights with respect to the exploitation of its resources.38

The Commission agreed to amend the 1953 text so as to include within the definition in article 67 the sea-bed and subsoil of other areas beyond the limit of 100-fathoms "to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas". As can be seen, this is not quite the same as the criterion of exploitability pure and simple which the Commission had adopted in its 1951 draft. There is now a distinction between the broad categories of submarine area and also, as in the conclusions of the Inter-American Conference, between two classes of rights: an existing right with regard to the continental shelf proper, and a potential right with respect to the other areas covered by the definition. The Commission decided, however, to retain the term "continental shelf" it is in current use and because the term 'submarine areas' used without explanation would not give a sufficient indication of the nature of the areas in question". In the same comentary on the article, it added: "The Commission considered that some

---

38. See Conference Room Document No. 14. See also Summary Record of the 357th and 358th meetings, Yearbook of the International Law Commission, 1956, Vol.1, pp.120-141

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

departure from the geological meaning of the term 'continental shelf' was justified, provided that the meaning of the term for the purpose of these articles was clearly defined. It has stated this meaning of the term in the present article".[39]

Nature of the rights of the coastal State

Article 68 defines the nature of the rights of the coastal State over the shelf and the other submarine areas envisaged in the draft. In 1951 the Commission employed in this connexion the expression "control and jurisdiction" but at its seventh and eighth sessions it preferred to use the term "sovereign rights". This second question of terminology apart, however, the Commission has always held the same view as to the nature of the rights which the coastal State may exercise, i.e. that the rights "are exclusive in the sense that, if the coastal State does exploit the continental shelf, it is only with its consent that anyone else may do so". At the same time, the Commission has never recognized such rights for any purposes which are not strictly that of exploring and exploiting the natural resources of the submarine areas in question and has accordingly refused to accept the pure and simple idea of the sovereignty of the State over the sea-bed and subsoil of those areas.[40] It has confined itself to acknowledging that the coastal State enjoys sovereign rights but in the nature of a strictly specialized competence.

Meaning of the term "natural resources"

Another no less important question arises in connexion with article 68, namely the meaning or scope of the term "natural resources" in this and other provisions of the draft. In its original draft (1951) the Commission used the term "mineral

---

39. Cf. Its 1956 Report referred to in footnote (36), paragraph (9) of the Commentary on the article. The formular envolved by the Ciudad Trujillo Conference and accepted by the International Law Commission has since been adopted in the Venezuelan Act on the Territorial Sea, Continental Shelf, and Protection of Fisheries and Air Space of 27 July 1956. See article 4 in the Official Gazette of the Republic, of 17 August 1956.

40. Ibid., paragraphs (1) and (2) of the Commentary on the article.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

resources", thereby limiting the exclusive rights of the coastal State to resources of that kind. At its fifth session (1953), however, it reconsidered the question and "came to the conclusion that the products of sedentary fisheries, in particular to the extent that they were natural resources permanently attached to the bed of the sea, should not be outside the scope of the regime adopted and that this aim could be achieved by using the term 'natural resources'. It is clearly understood, however, that the rights in question do not cover so-called bottom-fish and other fish which, although living in the sea, occasionally have their habitat at the bottom of the sea or are bred there".41 When we considered this problem at the beginning of the chapter we saw how important it was to specify to what living resources the status of resources of the sea-bed was to be attributed from the biological standpoint. When further considering this question at its eighth session, the Commission re-affirmed its view that such status could be attributed only to species permanently attached to the bottom of the sea and not to the other living resources which merely have an"ecological association" with it. Such resources, lacking the intimate physical and biological link with the bed of the submarine areas on which the sedentary species live, are regarded as belonging to the superjacent waters or to the waters in which they are found, and are accordingly subject to the legal regime established under the draft for such waters.

Legal regime of the superjacent waters and the air space above them.

The legal regime of the superjacent waters, both for the purposes just mentioned and for all others relating to the various uses of the sea, is the subject of the following article of the draft. As in the two previous drafts, article 69 states that the rights of the coastal State "do not affect the legal status of the superjacent waters as high seas". In the Commission's view, "a claim to sovereign rights in the continental shelf can only extend to the sea-bed and subsoil and not to the superjacent waters; such a claim cannot confer any jurisdiction or exclusive right over the superjacent waters, which are and remain a part of the high seas". By analogy, the article contains

---

41. Regarding the scope of the right of the coastal State over "sedentary fisheries", the Commission adds in its Commentary that "The coastal State, when exercising its exclusive rights must also respect the existing rights of nationals of other States. Any interference with such rights, when unavoidably necessitated by the requirements of exploration and exploitation of natural resources, is subject to rules of international law concerning respect for the rights of aliens." Ibid., paragraphs (3) and (6) of the Commentary.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

the same declaration with regard to the air space above the superjacent waters. For the Commission, no exceptions to the principle are admissible unless expressly provided for in the various articles of the draft.[42] This principle, as we have seen when reviewing present practice, is the only one in line with the most common trend in practice. However, its application in no way diminishes or restricts the exclusive rights that the coastal State is acknowledged to have for the purpose of exploring and exploiting the natural resources of the sea-bed and subsoil.

Limitations on the exercise of the rights of the coastal State

The next two articles of the draft state the limitations on the rights accorded the coastal State for the exploration of the submarine areas and the exploitation of their resources, the object of these limitations being to safeguard the rights retained by other States in those areas or zones and in the superjacent waters, in accordance with the principle of the freedom of the seas. As provided in article 70, the coastal State may not impede the laying or maintenance of submarine cables by third States in such areas, though this does not affect its right to take "reasonable measures" in the exercise of the rights it is acknowledged to have in those areas. For example, as pointed out in the Commission's Commentary, the coastal State may impose conditions concerning the route to be followed by submarine cables in order to avoid unjustifiable interference with the exploitation of the natural resources of the sea-bed and subsoil.[43] Article 71, particularly in paragraph 1, seeks to safeguard the freedom of the seas with respect to the two main activities to which it applies: freedom of navigation and freedom to fish. In imposing these other limitations on the exercise of the rights of the coastal State, the Commisssion notes, however, that "What the article prohibits is not any kind of interference" with navigation and fishing or the conservation of the living resources of the sea, but only "unjustifiable interference". The manner and significance of that qualification were the subject of prolonged discussion. The Commission was not unaware of the fact that the progressive development of international law which takes place against the background of established rules must often result in the modification of those rules by reference to new interests or needs. The extent of that modification must be determined by the relative importance of the needs and interests involved. To lay down, therefore, that the exploration and exploitation of the continental shelf must never result in any interference whatsoever with navigation and fishing might result, in many cases, in rendering somewhat nominal both the sovereign rights of exploration and

---

42. Ibid., Commentary on the article.

43. Ibid., paragraph (1) of the Commentary.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

exploitation and the very purpose of the articles as adopted. The case is clearly one of assessment of the relative importance of the interests involved. Interference, even if substantial, with navigation and fishing might, in some cases, be justified. On the other hand, interference, oven on an insignificant scale, would be unjustified if unrelated to reasonably conceived requirements of exploration and exploitation of the continental shelf. While, in the first instance, the coastal State must be the jugde of the reasonableness -or the justification- of the measures adopted, in case of dispute the matter must be settled on the basis of article 73, which governs the settlement of all disputes regarding the interpretation or application of the articles.44

System for determining the boundaries of submarine areas between various States

Before dealing with the above question, let us first consider article 72 relating to the mode of determining the limits of the continental shelf (or whatever submarine area is under consideration) in the two cases covered by the article, i.e. (a) where the submarine area is adjacent to the territories of two or more State whose coasts are opposite to each other and (b) when the same submarine area is adjacent to the territories of two adjacent States. As it points out in the Commentary, the Commission adopted the same principles as those generally employed for the delimitations of the territorial sea of States in one other of the above questions.45 In this connexion it will be noticed that in both cases the criteria for determining the limits of the submarine areas are of a supplementary kind and that those cases involving special circumstances justifying another mode of delimitation are excluded. In view of the possible difficulties in applying these criteria, it is most likely that the example of the Anglo-Venezuelan Treaty of 1942 will have to be followed, in which the submarine areas of the Gulf of Paria are delimited conventionally. For this reason the articles states that the boundaries shall be fixed by agreement between the States whose coasts are opposite or adjacent to each other.

Method of settling disputes

Let us finally turn to the method established in article 73 for settling any dispute that may arise concerning the interpretation or application of the provisions of the draft. Under the draft approved by the Commission in 1953, such disputes were to be submitted to arbitration at the request of any of the

---

44. Ibid., paragraph (1) of the Commentary

45. Ibid., Commentary on the article. See also the Commentaries on articles 12 and 14 of the draft.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Parties. At the eighth session, however, the majority of the members considered that a clause merely imposing compulsory arbitration would not be of much practical value unless the Commission at the same time laid down the procedure to be followed, as in the case of disputes relating to conservation of the living resources of the sea.[46] At the same time, however, it was acknowledged that the disputes on the subject would not have the extremely technical caracter of those arising in connexion with conservation. It therefore decided that arbitration could be replaced by reference to the International Court of Justice.

As pointed out in its Commentary, the Commission did not agree with certain members who were opposed to the insertion in the draft of a clause on compulsory arbitration or jurisdiction of the Court on the ground that there was no reason to impose on States one only of the means provided by existing international law and particularly by Article 33 of the United Nations Charter, for the pacific settlement of international disputes. These members also pointed out that the insertion of such a clause would make the draft unacceptable to a great many States. The majority of the Commission nevertheless considered such a clause to be necessary. The articles on the continental shelf are the result of an attempt to reconcile the recognized principles of international law applicable to the regime of the high seas with recognition of the rights of the coastal State over the continental shelf. Relying, as it must, on the continual necessity to assess the importance of the interest at stake on either side, this compromise solution must allow for some power of discretion. Thus, it will often be necessary to rely on a subjective assessment -with the resultant possibilities of disagreement- to determine whether, in the terms of article 71, paragraph 1, the mesaures taken by the coastal State to explore and exploit the continental shelf result in "unjustifiable" interference with navigation or fishing; whether, as is laid down in paragraph 2 of that article the safety zones established by the coastal State do not exceed a "reasonable" distance around the installation; whether, in the terms of paragrph 5 of the article, a sea lane is"recognized" and whether it is "essential to international navigation"; finally whether the coastal State, when preventing the laying of submarine cables or pipelines, is really acting in the spirit of article 70, which only authorizes such action when it comes within the scope of "reasonable" measures for the exploration and exploitation of the continental shelf. If this is not kept within the limits of respect for law and is not impartially complied with, the new regime for the continental shelf may endanger the higher principles of the freedom of the seas. Consequently, the Commentary concludes, it seems essential that States which disagree concerning the exploration and exploitation of the continental shelf should be required to submit any dispute arising on this subject to an impartial authority.[47]

---

46. See p..... et seq below

47. 1956 report, paragraphs (3) and (4) of the Commentary on article 73.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

The spirit of the Commission's draft

The foregoing review of the International Law Commission's draft brings out the effort made to reconcile and harmonize the various interests involved. To that end the Commission began by recognizing explicity and unambiguously the exclusive right of the coastal State to the exploration and exploitation of the natural resources of the sea-bed and subsoil of the continental shelf or insular shelf and of those of other submarine adjacent to its territory to where the depth of the superjacent waters admits of the exploitation of thoese natural resources. Since this constitutes an extension of State competence involving recognition of sovereign rights in areas that, by tradition, were entirely subject to the regime of the high seas, it was also necessary to regulate the exercise of those rights so that the interests of the international community in the free use of that area of sea should not be affected. That is the object of the limitations imposed to safeguard navigation and fishing in the superjacent waters and of the obligation to submit any disputes arising between States to the jurisdiction of the International Court of Justice. However, none of these limitations or the obligation to submit to compulsory jurisdiction is in the slightest degree opposed to the fact that the coastal State may exercise its exclusive right over the submarine areas for the purposes for which that right it recognized. This right, like the one to be studied in the next chapter, must of necessity be regulated to safeguard the interests and rights of other States under the principle of the freedom of the seas.

18. NATURE AND BASIS OF THE RIGHTS OF THE COASTAL STATE

As stated in the Introduction, the concept which has affected the principle of the freedom of the seas and the status of res communis traditionally attributed to the resources of the (high) seas is that of the special interests which the coastal State is acknowledged to have in those resources when near to its coasts. In the case of the marine fauna not coming within the category of living resources of the sea-bed of the submarine areas, the next chapter will show the reasons advanced in favour of recognizing the special interest of the coastal State in such species. The point for the moment, to round off the study made in this chapter, is to see what is the basis not only of the interest but more especially of the exclusive right that the coastal State is acknowledged to have with regard to the exploration and exploitation of the natural resources to be found, or that may later be discovered, in the sea-bed and subsoil of the

---

47. 1956 report, paragraphs (3) and (4) of the Commentary on article 73.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

submarine areas adjacent to its territory. Before doing so, however, we should consider, at least briefly, the various ways in which this right is conceived or enunciated, in order to fix its genuine juridical nature in the light of the information now at our command. Even though in the present state of development of international law on the subject both questions may have become rather academic, their consideration is perhaps not yet entirely devoid of practical value.

The concept of specialized sovereign competence

The question of the nature of this right of the coastal State has been brought up by the variety of terms used to describe it in the national and international legal instruments which proclaim it. As will be recalled, such terms and phrases as "jurisdiction and control", "national property", "exclusive sovereignty and jurisdiction", "sovereign right" or simply "sovereignty" have been used indiscriminately. As may have been realized, the lack of uniformity in these instruments is one of their most characteristic features, to the extent that they in fact raise a problem of terminology.48 From the strictly legal standpoint this diversity of nomenclature is purely formal, or at least does not affect the substance or the true essence of the right claimed or declared. For, irrespective of the term or phrase used to designate this right, in virtue of it the coastal State enjoys legal powers of an exclusive nature with respect both to the mere exploration of the sea-bed and subsoil of the submarine areas adjacent to its territory and to the exploitation or use of its natural resources. In a word, by virtue of this right the coastal State enjoys the exclusive use and exploitation of the said resources.

This statement may, however, need more explicit and precise formulation. Some instruments refer not only to the right of exclusive exploitation and use of the natural resources of the sea-bed and subsoil of the submarine areas, but also declare that they "belong" (or "appertain" in the words of the United States Proclamation) to the coastal State, thereby conveying the idea of a real right of ownership over the said areas, with the apparent effect of turning them into an integral part of its territory. Were such in fact the legal position created by such a declaration or the use of such a term, it might also be argued by analogy with the regime applying to the air space over the territory on dry land and to the sea-bed and subsoil

---

48. On the views expressed on the various terms and phrases appearing in unilateral instruments, see Hurst, Sir Cecil, "The Continental Shelf", Transactions of the Grotius Society (1948), Vol.34, pp.162 et seq.; Mourton op.cit., pp.276-281; and Azcárraga, op.cit., pp. 168-171.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

of the territorial sea, that the right of the State over the submarine areas extended to or embraced the waters over them and the air space above these "epicontinental" waters. Apart from the fact that such an analogy conflicts with the clearly prevailing trend on the subject, the geunine legal situation to which the declaration or term we are discussing gives rise is quite different. This will be clearly realized if it is borne in mind that the fundamental and sole purpose of the recognition of this right is to reserve for the coastal State the exploration and exploitation of the natural resources of the submarine areas adjacent to its territory. If such is its specific purpose and no other, what point or object can there be in speaking of such areas in terms of "ownership" or "belonging"? Moreover, if the coastal State really enjoyed ownership of such areas, how would one then explain, for instance, the survival of the right of the other States to lay and maintain submarine cables on the bed of those areas?

To follow on from what has just been said and round off the previous statement, the coastal State may exercise the exclusive right which it is acknowledged to have with respect to its submarine areas wholly and solely for the purpose of exploring and exploiting their resources. That being so, without wishing to suggest any solution to the terminological problem before us, one might say that the right is simply equivalent to an extension of specialized sovereign competence. Following up this idea, it should be added that this competence, in accordance with an already quite clearly defined trend, involves legal powers which are not only present but also future or potential. In this connexion, it will be recalled that the right of the coastal State relates both to the natural resources to be found or known to be in the submarine areas and to those that may appear or be discovered there later. The exercise of this right will accordingly depend on the particular case in point. The difference between these two types of power can also be seen when the question is viewed from another angle to some extent related to the former. State enjoy present legal powers when the submarine area adjacent to their territory has the configuration of a shelf, defined by the limit of the 100-fathom line. Potential or future powers would be enjoyed by them, for example, according to the system adopted by the International Law Commission, with respect to the slope and the corresponding part of the terrace, and by all coastal States with regard to the other submarine areas adjacent to their territories. In the first case, recognition of the State's right is subject to no other condition than the mere existence of a continental or insular shelf. In the second place, on the other hand, it depends on whether the depth of the subjacent waters beyond the edge of the shelf, or, when there is no shelf, that of the waters covering the submarine areas in question, permit of the exploration and exploitation of the natural resources of the sea-bed and subsoil of the sea contiguous to the territory of the State. As was previously pointed out, the fundamental idea underlying this trend is to ensure

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

that, at least in law, all coastal States are on a pontentially equal footing for the purpose of the enjoyment of this right.

The traditional conception of the basis of the right

To turn to the other question, what is the basis of the interest and right which the coastal State is acknowledged to have with respect to the natural resources of the submarine areas adjacent to its territory? At first it was thought that such resources might come to belong to the State by one of menas of acquisition recognized under international law, namely that of occupation of a res nullius. In the article referred to in a previous section, Sir Cecil Hurst, basing himself on the opinion of the English jurist Hall, justified the acquisition of sedentary fisheries and the resources of the subsoil when they had been effectively or continuously occupied by the State or its nationals. In his opinion, possession from time immemorial of such resources gave rise to a right of sovereignty or ownership.[49] Various authors imbued by the same idea have accepted this thesis, which they claim to have been first formulated by Battel. In their opinion a distinction should be made between the juridical nature of the sea and that of its bed and subsoil, the latter being acknowledged as liable to occupation without the freedom of the superjacent waters being necessarily affected.[50] Viewed in this fashion, the right to the exploitation of the resources of the bed and subsoil of the sea would not be the same as that at present spoken of and recognized. For, according to the traditional conception, not only the coastal State but any other State could, by mere act of occupation, acquire the right to the exclusive exploitation of the natural resources of the submarine areas adjacent to the territory of any State. And such a fact would be totally inadmissible in the doctrine and practice now prevailing.

Moreover, the idea of occupation does not, in any case, serve as a basis for any of the national claims made since 1945 or for

---

49. Loc. cit., in footnote 9, pp. 39-40

50. See, inter alia, Oppenheim-Lauterpacht, International Law, seventh ed., 1948, vol.I, pp. 576-578; and Bonfils-Fauchille, Traité de Droit International Public (1925), vol. I, pp. 18-61.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

the recognition accorded this right by international organizations and conferences. In the first place, the new claims, in contrast to the old ones, have generally been made before actual exploitation of the submarine areas began. Most State have claimed the right before undertaking the exploitation and used of the resources of such areas. Secondly, the right does not even appear as subject to the requirement of subsequent occupation, whether effective or symbolic, but only as subject to the pure and simple fact of the claim having been publicly made by the coastal State. And when the right has won collective recognition, as happened at the Inter-American Specialized Conference at Ciudad Trujillo, even the unilateral statement of claim is unnecessary. That being so, it may be stated that any coastal State has, ipso facto, this exclusive right to explore and use the natural resources of the submarine areas adjacent to its territory. If this standpoint is adopted, the question of the basis of the right appears in another light, for now it is merely a question of knowing what justifies this extension of specialized sovereign competence.

The socio-economic interest of the coastal State and other factors and considerations.

As with so many legal institutions and rules, the principle governing the exploitation and use of the submarine resources is explained and justified by factors or considerations foreign to law. One of them is the geographical and geological factor explicitly referred to in various national declarations. The Tenth Inter-American Conference (Caracas, 1954), in the resolution previously considered, drew attention to this factor in recognizing "that there is a geological continuity and physical link between the continental and insular territories of each State and its submarine shelf, which constitutes with the adjacent land a geographical unit". On this point scientists debate as to whether the existence of these submarine are contiguous to continents and islands is due to erosion, silting, the invasion by the sea of a previously continental or insular area or to some other geographical phenomenon .51 But jurists and governments, basing themselves on one or other of these theories, have seen in this factor a reason explaining and justifying the right of the coastal State with respect to the resources of the bed and subsoil of the sea adjacent to this territory.

Socio-economic considerations are closely connected with the

51. Cf. Ruelas, "La Cornisa Continental Territorial", Revista de Derecho Internacional (Habana, 1930), vol.XVLI, p.130; Gidel, op.cit., p. 59 et seq.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

geological and geographical factor. As regards substance, though not as regards form, they are the ones to which national claims attribute mos importance, the claims made by Great Britain and Venezuela in their treaty are for the purpose of "marking provision for and defining as between themselves their respective interests in the submarine areas in the Gulf of Paria". One of the grounds invoked in the preamble to the United States Proclamation of 1945 is that "these resources frequently form a seaward extension of a pool or deposit lying within the territory". The Chilean Declaration of 1947, for its part, describes the "natural riches contained in the continental shelf" as "essential to the life of the nation". Considerations of justice and equity, security, etc. are also put forward, as in the United States Proclamation and other statements, but these considerations naturally either involve somewhat vague and indefinable concepts or are of more limited application. Economic and social considerations in the proper sense of the term, besides constituting the main and decisive motive both for the national claims and for the collective recognition of this right of the coastal State, are to be found alongside the geological and geographical considerations in every case.[52]

It must be added, as a consideration of no less importance when it is a matter of explaining and justifying the new principle, that this extension of specialized sovereign competence has found its way into practice without any opposition or objection on the part of the States which have taken no part in the legislative trend or in the collective action that we have studied. It is undoubtedly for this reason that the International Law Commission, in its Report to the General Assembly, stated that considerations of general utility provide a sufficient basis for the principle of the sovereign rights of the coastal State, which is based on general principles corresponding to the present needs of the international community and is in no way incompatible with the principle of the freedom of the seas.[53]

---

52. Professor Antonio Luna, in full agreement with the theory of Azcárraga on the question, maintains in the prologue to the latter's book that it is precisely the "preferential interest of the coastal State that justifies its right over such a zone". Cf. op.cit., p. 15

53. 1956 Report, paragraph (7) of the Commentary on article 68.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

CHAPTER IV

THE CONSERVATION OF THE LIVING RESOURCES OF THE HIGH SEAS

The living resources which are to be found outside the internal and territorial waters of the coastal State, and which do not have the status of resources of the sea-bed of the submarine areas adjacent to its territory, raise only one international problem, namely, that of their conservation. In the three cases just mentioned the coastal State can reserve for itself or its nationals the right to use those resources and, consequently, has the exclusive power of regulating the fishing activities which require its protection. In the case of the resources of the high seas, on the other hand, the right to use them is guaranteed to all States and their nationals under the principle of freedom of fishing. Accordingly, when the use of those resources makes it necessary to regulate fishing with a view to their conservation, the question of competence as between the States concerned is bound to arise. The purpose of this chapter is to study the legal principles governing that question of competence. But as in previous cases, we will first consider the technical and scientific and the socio-economic aspects of the conservation problem on which the question of competence basically depends.

19. THE TECHNICAL AND SCIENTIFIC ASPECT: TERMS OF REFERENCE AND AGENDA OF THE ROME CONFERENCE (1955)

The technical and scientific aspect of the problem of conserving the living resources of the sea was the subject of the Conference held at Rome in the spring of 1955. Although it was the first meeting on such a scale, the Conference was not the only effort that had been made, nor the only international meeting held for that purpose. Accordingly, before discussing its terms of reference and agenda, let us first briefly review its more important antecedents.

More important antecedents of the Rome Conference

Towards the end of the last century, international meetings on fisheries were held at Sables d'Olonne (1886), Bergen (1898), and Stockholm (1899). In 1900, on the occasion of the Paris Universal Exhibition, the first International Congress on Agriculture and Fisheries was held and recommended the establishment of an international commission for the regulation of fisheries and of a standing committee to organize future congresses. As a result of these moves and of subsequent international conference, various regional councils were set up to explore the riches of the sea. The first to be established was the International Council for the Exploration of the Sea, which, from its first meeting in 1902, had its seat in Copenhagen. This Council served as a model for

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

other established later and was the one which carried on most consistent and varied investigation. Other similar bodies are the General Fisheries Council for the Mediterranean (formerly the International Commission ofr the Scientific Exploration of the Mediterranean), the North American Council on Fishery Investigations, the Indo-Pacific Fisheries Council, and the Permanent Commission for the Exploitation and Conservation of the Maritime Resources of the South Pacific whose duties also include scientific investigation and the exchange of information with other bodies.[1]

The former League of Nations also dealt with the problem in its work on the progressive codification of international law. The Committee of Experts which performed the preparatory work included the topic in the list of questions which appeared right for international regulation and appointed the Argentinian jurist, José León Suárez, to enquire into the question with reference, inter alia, to the treaties dealing with the subject. The report on the exploitation of the products of the sea submitted by Suárez was transmitted to governments, on the basis of whose replies the Committee recommended the convening of an international conference including experts in applied marine biology, persons engaged in marine industries, and jurists. At its 1927 session, the League Assembly resolved to instruct its Economic Committee to study, in collaboration with the International Council of Copenhagen, the question whether, and in what terms, for what species and in what areas, international protection of marine fauna could be established. Finally, a further effort was made at the Conference for the Codification of International Law held at the Hague in 1930 likewise under League auspices. The Conference considered the question but confined itself to affirming the importance of the work already undertaken or to be undertaken on the subject, either through scientific research or by practical methods, i.e. measures of protection and collaboration which may be recognized as necessary for the safeguarding of riches constituting the common patrimony.[2]

Resolution 900 (IX) of the General Assembly

On the eve of the ninth session (1954) of the United Nations General Assembly, the delegations of Brazil, China, Honduras, Liberia, Nertherlands, Nicaragua, Turkey, United Kingdom and the

---

1. Cf. Jessup, "L'Explotation des Richesses de la Mer, Recueil des l'Académie de Droit International (1929-IV), Vol.29, p. 245, et seq. See also the Report of the Rome Conference referred to in footnote 22 below, Section V.

2. Cf. Publications of the League of Nations, V., Legal Questions 1930. V.7. See also the Report by Suárez and the Committee of Experts recommendation, Doc. V. Legal 1926. V.6.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

United States of America requested the inclusion of the following additional item in the provisional agenda: "Economic development of fisheries and question of fishery conservation and regulation". According to the explanatory memorandum submitted by those delegations, "these problems are in large measure of an economic and technical character", it being accordingly suggested that,"after the discussion of the problem, a resolution should be adopted whereby problems of the economics and conservation of high seas fisheries be referred either to the Food and Agriculture Organization or to a special government conference of experts for consideration and recommendations".3 The joint proposal was referred to the Sixth (Legal) Committee, where it was considered in the light of the general resolution which it had already adopted on maritime questions.4 As a result of the acceptance of amendments proposed by a group of Latin-American delegations to the draft resolutions submitted by some of the delegations which had first raised the question, the said proposal was brought into line with the general resolution.5 Thus, it was decided to convene an international technical conference to study only "the problem of the international conservation of the living resources of the sea" with a view to making "appropriate scientific and technical recommendations which shall take into account the principles of the present resolution and shall not prejudge the related problems awaiting consideration by the General Assembly". The report of the Conference was to be referred to the International Law Commission "as a further technical contribution to be taken into account in its study of the questions to be dealt with in the final report which it is to prepare pursuant to Resolution 899 (IX) of 14 December 1954".6 We shall return later to the terms of reference of the Rome conference; let us see for the moment for the moment what were the items in its agenda, how the preparatory work was organized and the lines alone which its work developed.

The agenda of the Conference

In pursuance of paragraph 4 of Resolution (IX) the Secretary-General of the United Nations, in consultation with the Fisheries

---

3. See Doc. A/2707

4. i.e. Resolution 899 (IX), in which it had re-affirmed the idea of the unity of the problems relating to the sea and recalled the Assembly's decision not to deal with them separately. See Introduction, p...6 above.

5. The draft resolution is given in Doc. A/C.6/L.343, and the amendments in Docs. A/C.6/L.345 and L.345/Rev.1.

6. See Introduction, p... above.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Division of the United Nations Food and Agriculture Organization (FAO), convened a group of experts on the subject selected so as to represent the main fishing regions of the world. This group was entrusted with the preliminary studies and the preparation of the draft agenda. This agenda, which was adopted by the Conference, contained the following five substantive items:7

1. Objectives of fishery conservation

2. Types of scientific information required for a fishery conservation programme, for example:

   (a) Extent of separation of the fishery resource into independent or semi-independent populations ("conservation management units")

   (b) Magnitude and geographical range of the populations constituting the resource

   (c) Pertinent facts respecting the life history, ecology and behaviour of the species constituting the resource

   (d) Effects of intensity and kind of exploitation on the resource

   (e) Relationships of the resource to other species being exploited simultaneously

3. Types of conservation measures applicable in a conservation programme

4. Principal specific international fishery conservation problems of the world and measures and procedures applicable and being applied for their solution:

   (a) Problems for the resolution of which agreed international measures and procedures have been instituted in the following areas:

      (1) North Atlantic
      (2) South Atlantic
      (3) Mediterranean
      (4) Indo-Pacific
      (5) North Pacific
      (6) South Pacific
      (7) Antartic and other whaling areas

   (b) International conservation problems requiring solution in the above-mentioned areas and elsewhere

---

7. Cf. Doc. A/Conf.10/1/

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

(c) Applicability of existing types of international conservation measures and procedures to pending problems

5. International conservation problems for the resolution of which existing types of international measures are not adequate and possible means of resolving them.

The first item raised a fundamental question, namely the purpose that the regulation of fisheries should serve. The second and third related to specific aspects of the problem of conservation, the purpose of whose consideration was to determine the manner and extent to which the exploitation of living resources should be regulated. The last two items had basically the same object, i.e. to study the international regulation systems adopted in practice and to take advantage of the experience acquired in order to improve them in the future.[8]

Preparatory work and direction taken by its deliberations

The Conference had at its disposal on a vast body of technical and scientific documentation these items prepared by experts. Some of the documents were monographs on particular aspects such as the contribution of the various siciences of the sea to the study of fisheries, the results of investigations in certain fishing zones or into the life, development and yield of particular species. A large part of these documents represented the preparatory work for the Conference but some of them were submitteed by various delegations while it was in session. Under the terms of the convening notice, two specialized agencies of the United Nations (FAO and UNESCO) and eleven international councils and commissions concerned with fisheries were represented by observes. Almost all these bodies also submitted papers on questions and aspects within their fields.[9]

This abundant and valuable working material ensured that the deliberations of the Conference retained their fundamental technical and scientific character. The importance for the immediate future of the studies submitted, the statements made by persons of acknowledged competence in the various questions

---

8. See comments on the provisional agenda, Doc. A/Conf.10/2.

9. A list of these papers is given in Annex D to the Report of the Conference, while Annex B contains a list of the international organizations represented. Cf. Report of the Conference referred to in footnote 22 above.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

involved in conservation, and the conclusions and recommendations of the Conference at the close of its work, is beyond all doubt. But as we pointed out during its deliberations, it was also equally certain that there was danger of the greater part of the practical utility of its efforts being lost if it did not direct its work towards the specific aim for which it had been convened, namely if it did not use the valuable technical and scientific contributions to further the juridical purpose they were intended to serve, the objectives pursued in the first place by the International Law Commission and later by the General Assembly of the United Nations. That did not mean that the Conference should go beyond its terms of reference and trespass on the legal aspects of the problem of conservation. Far from that, the idea was precisely that the Conference should comply to the full with its terms of reference, guiding its deliberations along such lines as to make its work a useful contribution for those who were to elaborate the juridical system applying to the conservation of the living resources of the sea. Indeed, according to the spirit and letter of resolution 900 (IX) there had been no other purpose in convening the Conference. It was accordingly clear that our deliberations must be directed towards that end in order to provide the International Law Commission with the material it would need when reconsidering the problem of conservation.10

Despite the limitations necessarily imposed by its strict terms of reference, the Conference completed its work without exceeding those terms and performed work of fundamental utility for those who were later to study the juridical aspect of the conservation of the living resources of the sea.

20. THE UTILIZATION OF THE LIVING RESOURCES OF THE SEA AND THE PROBLEM OF THEIR CONSERVATION

Current aspects of the problem

As pointed out in the Introduction, the problem of conserving the living resources of the sea has its source in the intensity of their utilization and in the technical means employed for the purpose. Strictly speaking, the need for conservation is not peculiar to our times. The need was appreciated in quite early times and some measures were even taken to meet it. At the present time, however, the problem is much more complex. This is not entirely due to the greater intensiy of utilization of the resources or to the extraordinary development of fishing technique: it is also due to certain social and economic factors which, as

---

10. Cf. Record of the Twelfh Plenary Meeting, pp.2-3, Doc. A/Conf. 10/SR.12. See other statements on the same lines in the Record of the Eleventh Meeting, p.8, and of the Twelfth Meeting, p.3, ibid. SR.11 and 12.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

will be seen later, condition the problem of conservation at the present time. In a word, the present problem is not merely a scientific and technical one; it is also social and economic, and the juridical system applying to it must therefore take account of this complexity of factors.

Antecedents of conservation measures and programmes

Among the most outstanding antecedents of modern conservation measures and programmes is often cited the regulations for salmon fishing submitted to the King of England by the County of Cumberland in 1278 and approved by him. These regulations, to prevent the "serious destruction to salmon", established in certain waters some of the measures which continue to be employed today, such as closed times, restrictions on the use of nets and provision for a gap between nets in the river big enough to allow a sow and her pigs to pass later colloquially called "the king's gap". In a petition to the King it was stated that "where in creeks and havens of the sea there used to be plenteous fishing, to the profit of the kingdom, certain fishermen for seven years past have subtily contrived an instrument which they called 'wondyrchoun', made in the manner of an oyster dredge but which is considerably longer, upon which instrument is attached a net so close meshed that no kind of fish, be it ever so small, which enters therein can escape, but must stay and be taken. And that the great and long iron of the wondyrchoun runs so heavily and hardly over the ground when fishing that it destroys the flowers of the land below water there, and also the spat of oysters, muscels and other fish upon which the great fish are accustomed to be fed and nourished".-1

It is interesting to note the discovery so far back of the two main factors that give rise to the problem of conservation, viz. overfishing and the effect of using certain fishing appliances on the life of other species and on the ecology of their environment. As will be seen when we consider the present stage of the problem, the development of techniques for exploiting the living resources of the sea has brought with it not only the danger of overfishing but also that of indirectly affecting species or stocks that are not being fished and also the ecology of their environment.

Reaction against the regulation of fishing

Yet scientists and experts on the subject have not always been

---

11. Cf. Moore, E.W. Moore R.S., The History and Law of Fisheries, London, 1903, pp. 172 and 174. The same work (p. 175 et seq.) mentions other antecedents of the conservation measures adopted in England from the date indicated.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

will be seen later, condition the problem of conservation at the present time. In a word, the present problem is not merely a scientific and technical one; it is also social and economic, and the juridical system applying to it must therefore take account of this complexity of factors.

Antecedents of conservation measures and programmes

Among the most outstanding antecedents of modern conservation measures and programmes is often cited the regulations for salmon fishing submitted to the Kind of England by the County of Cumberland in 1278 and approved by him. These regulations, to prevent the "serious destruction to salmon", established in certain waters some of the measures which continue to be employed today, such as closed times, restrictions on the use of nets and provision for a gap between nets in the river big enough to allow a sow and her pigs to pass later conloquially called "the king's gap". In a petition to the King it was stated that "where in creeks and havens of the sea there used to be plenteous fishing, to the profit of the kingdom, certain fishermen for seven years past have subtily contrived an instrument which they called 'wondyrchoum', made in the manner of an oyster dredge but which is considerably longer, upon which instrument is attached a net so close meshed that no kind of fish, be it ever so small, which enters therein can escape, but must stay and be taken. And that the great and long iron of the wondyrchoun runs so heavily and hardly over the ground when fishing that it destroys the flowers of the land below water there, and also the spat of oysters, mussels and other fish upon which the great fish are accustomed to be fed and nourished".11

It is interesting to note the discovery so far back of the two main factors that give rise to the problem of conservation, viz. overfishing and the effect of using certain fishing appliances on the life of other species and on the ecology of their environment. As will be seen when we consider the present stage of the problem, the development of techniques for exploiting the living resources of the sea has brought with it not only the danger of overfishing but also that of inderectly affecting species or stocks that are not being fished and also the ecology of their environment.

Reaction against the regulation of fishing

Yet scientists and experts on the subject have not always been

---

11. Cf. Moore, S.A. Moore H.S., The History and Law of Fisheries, London, 1903, pp. 172 and 174. The same work (p. 175 et seq.) mentions other antecedents of the conservation measures adopted in England from the date indicated.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

unanimous concerning the idea that the development of fishing technique could affect marine fauna, bringing about a decline in the yield of the species or the extermination of any one of them. At the end of the last century the theory, whose principal exponent was T.H. Huxley, gained currency that there was no ground for any regulation of fishing with a view to its restriction and that such regulation was accordingly unjustified and unnecessary. This reaction against conservation measures was partly reflected in the repealing of a great deal of the previous legislation. In contrast to the antecedents mentioned above, the idea of unrestricted freedom to fish was enunciated.[12] The same doctrine or idea, but with some slight variations in tone, is still upheld by some contemporary scientists. Huntsman, for instance holds that the high reproduction rate of almost all species makes it possible for man to withdraw considerable quantities from fish stocks in their proper environment without affecting future generations; that fishing will never be so intense as to reduce the catches, except in those cases in which it is materially possible to remove the whole stock; and that there is no sound foundation for thinking that restricting fishing will increase the long-term yield.[13]

Origin and development of the now dominant theory

Such views however constitute an exception from the dominant trend of opinion. It is interesting to observe that the present theory also began to be formulated towards the end of the last centruy, but as a result of the first genuine scientific investigation undertaken on the subject. Petersen, for instance, writing in 1894 on the decrease in the catch of flatfish in Danis waters says that "It cannot well be doubted that the same area of sea would be able to give a quantitively greater profit as a constancy, when we suffer the scope of fish to be as fully developed as in the years before too eager fishing commenced and then took exactly as much as the stock could reproduce by new growth".[14] In 1918 Baranov published the first mathematical model of the relation of vital processes (reproduction, growth and mortality)

---

12. Cf. Huxley T.H. Inaugural Address to the Conference held in connexion with the Great International Fisheries Exhibition, Conf. Docs., Lit.iv, p.18.

13. Fishery management and research, Jour. du Cous, 1953, Vol.19, No. I, pp. 44-45.

14. Petersen, C.F.J. The Decrease of our Flatfish Fisheries, Danish Biological Station, Report (Copenhagen, 1894, p. 58).

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

to the yield of fisheries.[15] Later the development of scientific investigation made it possible for new conclusions to be reached and for some of those maintained from early times to be more accurately confirmed.

The present theory, as formulated by E.S. Rusell, is that "the yield can be increased by intensifying fishing up to a certain point, but once that maximun is reached, the more fishing is done the less the quantity of the catch."[16] One of the supporters of the same theory, Michael Graham, states it as follows: "When the rate of fishing effectively governs the average age of a stock of fish, then varying the rate of fishing would control the yield of the fishery."[17] From the scientific field, the new theory passed to that of practice, being adopted as the fundamental role of conservation programmes. In 1945, the Director of the Fish and Wildlife Service of the United States declared that "the purpose of the conservation programme of the Government of the United States of America is to ensure a maximum sustained yield from our natural resources." Two years later, the same idea was expressed in similar terms in the International Convention for the North-West Atlantic Fisheries.[18] So, from the strictly technical and scientific standpoint, the purpose served by the conservation measures is to obtain the maximum sustained yield of the species exploited, the rate of fishing and the type of appliances and methods used having to be adjusted to that end.

Naturally, the point of departure of the Rome Conference was to decide whether fishing affected the productivity or yield of the living resources of the sea. The scientific documentation submitted to the Conference embraced practically all the main fishing regions or zones of the world. With regard to the North

---

15. Cf. Biological On the Question of the Biological Foundation of fisheries quoted by Michael Graham, Rome Conference Doc. A/CONF.10/L.2, p.7. With regard to the earliest scientific researches and theories, see also McIntosh, W.C., The Resources of the Sea (London, 1899), and Garstang, V., The Impoverishment of the Sea, Journal Mar. Biol Assoc. United Kingdom, N.S., vol. 6, no. 1, pp. 1-69.

16. The over-fishing problem (Cambridge, 1942). p. 75.

17. A first approximation of a modern theory of fishing, Doc. submitted to the Rome Conference, A/Conf.10/L.7, p. 3.

18. See Graham, Concepts of conservation, Doc. A/Conf.10/2, p.10, and Schaefer, M.B., Fisheries dynamics and the concept of a maximum equilibrium catch, Proceedings of the Gulf and Caribbean Fisheries Institute, Sicth annual session, Miami Beach, November. 1953.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Sea fisheries, the ones which have probably been most studied, pronounced concern was shown for the problem of over-fishing in that area, of which there were already some signs towards the end of the last century. Similar concern was expressed regarding the stocks of fish and sea mammals in Arctic waters, particularly in those contiguous to Greenland. Concerning the North-East Pacific, attention was drawn to the rapid decline in the quantity of certain stocks of salmon, cod, herring and lobsters, owing to gross over-fishing. With reference to halibut fisheries in the North-East Pacific and the Bering Sea, it was pointed out that, thanks to the work of the International Pacific Halibut Commission, those fisheries had already recovered from the decline in yield due to over-fishing. With regard to the exploitation of biological resources in coastal waters, attention was directed to the destruction of fish due to the use of certain methods and appliances.[19] As will be seen a little further on, the Rome Conference also expressly recognized the fact that fishing may have an adverse effect on the productivity or yield of the living resources of the sea.

Cases in which conservation is unnecessary and unjustified

There is certainly no foundation to-day for the theory that the living resources of the sea are inexhaustible and that any steps undertaken to restrict fishing, on the plea of the need for conservation, are unnecessary and unjustified. Yet, recognition of fishing techniques, are no longer inexhastible, in no way means that conservation measures are invariably required. Some of the scientific papers submitted to the Rome Conference brought out the fact that the problem of conservation arises only when there is adequate scientific proof that the future of the fishery would be jeopardized if fishing operations continued.[20] The draft sub-

---

19. Cf.Lucas, C.E., Regulation of North Sea Fisheries under the Convention of 1946, Doc. A/Conf.10/L.5; Hansen, P., The Importance of Conservation of Stocks of Fish and Sea Mammals in Arctic Waters (A/Conf.10/L.31); Moiseev, P.A., Fluctuations in the Commercial Fish Populations of the North-Western Pacific in relation to environmental and other factors,(Doc. A/Conf.10/1.14); Dunlop, H.L., Management of the Halibut Fishery of the North Western Pacific Ocean and Bering Sea (A/Conf.10/L.13); and belloc, G., The Conservation of Biological Resources in Coastal Waters (A/Conf.10/L.12)

20. Cf. Kesteven and Holt, Classification of International Conservation Problems, A/Conf. 10/L.6. Another paper made the point that it is also dangerous to delay taking conservation measures and that it is perhaps even more risky to take premature measures, as in the case of a very dense sea population which would gain by having its volume reduced (Cf.Poulsen, Doc.cit.) At the same time, conservation is also unnecessary when it can be shown that the decline in yield of a particular species or its total disappearance is due, as often happens, to natural causes entirely unconnected with fishing.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

mitted to the Conference by the Cuban and Mexican delegations took up this conservation principle, affirming that the need for and urgency of measures to conserve the living resources of the sea depended on the existence of "scientific evidence that they are being or might be exposed to waste, harm o extermination."21 Recognizing the importance of stressing this idea, the Conference agreed to state it explicitly, and accordingly, in the first of its conclusions, after stating that "Conservation is essential in the development of a rational exploitation of the living resources of the seas", it added that "consequently, conservation measures should be applied when scientific evidence shows that fishing activity adversely affects the magnitude and composition of the resources or that such effects are likely."22 When we come to consider the conditions governing the legal validity of a conservation measures or programme, it will be seen how important it is for this conservation principle, which a first sight seems self-evident, to be explicitly recognized.

21. PRESENT AIMS OF CONSERVATION

The socio-economic aspect of conservation

It is thus that the problem of conserving the living resources of the sea presents itself to scientists and specialists in the subject. But as we have pointed out on more than one occasion, conservation at the present day is not aerely a technical and scientific problem but an economic and social one as well. It is due to the fact that the yield of the resources and their use and exploitation nowadays constitute one of the decisive factors in the economies of many countries, as well as one of the most important sources of food in the world.

This fact became abundantly clear during the deliberations of the Rome Conference. While the object of a conservation measure or programme is indeed to obtain the "maximun sustained yield" of the specie or species exploited, this statement is not enough by itself if the true ends of conservation in contemporary life are to be fully defined. The economic and social elements that may condition the aims of conservation at a given moment must also be indicated. The living resources of the sea are not conserved for the sole purpose of ensuring compensation for the human efforts involved in their exploitation, by achieving a

---

21. Cf. Doc. A/Conf.10/GC.1, paragraph 1.

22. Cf. Report of the International Technical Conference on the Conservation of the Living Resources of the Sea, Doc. A/Conf. 10/6, Chapter II, paragraph 16.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

maximum sustained yield. Nor should the purpose be confined to the purely commercial aspect of the utilization of the resources, i.e., merely to ensure the greatest possible profit for the fishing industry. Other human needs must be taken into account, needs whose satisfaction depends, at times vitally, on this "maximum sustained yield" of certain species of marine fauna. Some of these needs, food for instance, are common to mankind. Others, however, arise only in connection with certain countries. But in every case there are always economic and social needs which imply interests naturally of far greater importance than the private interests of those exploiting the resources. This approach to the aims of conservation shows us that any measure or programme adopted for the purpose is bound to fulfil the function of protection with regard to the various interests indicated. Hence, it is this aspect of the general problem of conservation which is of special importance from the legal standpoint. The purely scientific and technical aspect, apart from its intrinsic importance and utility, provides the essential basis for determinig when and how conservation must be undertaken. But to devise the juridical system to govern exploitation with a view to ensuring the conservation of the resources exploited, the economic and social aims or functions of conservation are the data enabling the juridical solution to be found for the conflicts of interest which we have just mentioned.

The Cuban and Mexican thesis at the Rome Conference

Basing itself on these considerations, the Cuban and Mexican draft submitted to the Rome Conference defined the objectives of conservation as follows:[23]

> 2. The primary objective of the conservation of the living resources of the sea is to obtain in a form useful to mankind, the optimum sustainable yield with the minimum harm to the species concerned and to its ecological environment. In certain cases, however, social and economic factors may have a bearing upon the evaluation of the objective of conservation. In particular, when formulating conservation programmes, account should be taken of the needs of the coastal State and of its special interest in maintaining the productivity of the resources of the high seas near to its coasts.

The definition given in the draft being sufficiently explicit in itself, we need do no more than emphasize its essential features. In the first place, in the phrase "the optimun sustainable

---

23. Cf. Doc. referred to in footnote 21.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

yield with the minimum harm to the species concerned and to its ecological environment" it covers the scientific and technical aspect of conservation considered in the previous section. On the basis of this concept it establishes as the primary object of conservation to obtain this optimum sustainable yield of the living resources of the sea in a form useful to mankind. Thereupon, it points out that in certain cases social and economic factors may have a bearing upon the evaluation of the objective of conservation. Following up this idea of possible exceptions, it refers specifically to the special position in which the coastal State may be placed with respect to the exploitation and conservation of the resources of the high seas near to its coasts. In this way the draft brought out the rôle to be played by conservation in the various cases that may arise in reality. On the one had, it recognizes that the primary objective is to serve the "general interest", i.e. the interest in ensuring the optimum sustainable yield of the living resources of the sea for mankind, as represented more particularly by those countries whose nationals are engaged in their exploitation. On the other hand, it recognizes that this objective may be conditioned by the existence of a "special interest" of the coastal State in maintaining the productivity of the resources near to its coasts.[24]

The idea of recognizing the general interest as the primary objective of conservation naturally presented no great difficulty to the Conference. The position was not the same, however, with regard to the idea of recognizing as well the special interest that the coastal State might have in certain circumstances. However, the opposition to recognition of this special interest was not exactly based on the intrinsic merits of the interest but rather on the fact that it raised a question which, by its nature, was outside the explicit terms of reference assigned to the Conference. Thus the delegations which opposed the idea, irrespective of the true motive that some may have had for such opposition, did not pass direct judgment on the question of whether the special interest in question existed or not. The delegations which supported the Cuban and Mexican draft, on the other hand, did outline the reasons and the circumstances which gave rise to this special interest and to the need to give explicit recognition to it when defining the objectives of conservation.[25]

---

24. See statement of the authors of the draft in the Record of the Nineteenth Plenary Meeting, Doc.A/CONF.10/5 R.19, pp.3-4.

25. See Record of the Tenth, Fifteenth and Nineteenth Plenary Meetings. See also the summary of the views expressed during the debate in the Report of the Conference, referred to in footnote 22, paragraphs 44-47.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Acceptance of the thesis by the Conference

After long debate in sub-committee, in the General Committee and in plenary, the thesis of the Cuban and Mexican proposal was accepted by the Conference, according to the third paragraph of Chapter II of its Report:[26]

> "The principal objective of conservation of the living resources of the seas is to obtain the optimum sustainable yield so as to secure a maximun supply of food and other marine products. When formulating conservation programmes, account should be taken of the special interests of the coastal State in maintaining the productivity of the resources of the high seas near to its coast."

It would of course be idle to make any comentary on the nature or extent attributed by the Conference to the "special interests of the coastal State in maintaining the productivity of the resources of the high seas near to its coast". The fact that this interest was recognized does not mean that the Conference as a whole, or even those who made or supported the move to have it recognized, have the same views on its magnitude and legal implications. Far from that, there were profound differences, particularly on the second point. But this is another aspect of the question that will be considered later; the essential thing for the moment is to bring out the pure and simple fact that the Rome Conference expressly recognized the duality of interests at stake in determining the objectives of the conservation of the living resources of the sea.

The recognition of this fact was of undeniable importance and legal significance. The existence of the two great interests which had been recognized and the possibility that in specific circumstances they might come into conflict made absolutely inevitable a substantive review of the traditional concepts and principles of the international law of the sea, and in particular, freedom to fish on the high seas, whic is a principle enunciated and upheld on the basis of the two-fold idea that the wealth of the sea is inexhaustible and, furthermore, that being res communis, no one can claim special interests and rights in its regard.

---

26. Cf. Report of the Conference, paragraph 48. The vote in the plenary meeting at which this text was adopted was taken on the amendment submitted by the delegations of Cuba, Mexico and Peru (Doc. A/Conf.10/L.28, Add.1, Corr.1) to the General Committee draft (Doc.A/Conf.10/L.28). On the proposal of one of the sponsors of the amendment, the text as adopted at the meeting of 5 May included in its first part the words "in a form useful to mankind" although the idea was really implicit in the new text. Cf. A/Conf.10/SR.19, p. 3.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

22. THE QUESTIONS OF COMPETENCE: COLLECTIVE REGULATION AND UNILATERAL REGULATION BY THE COASTAL STATE

General formulation of the question

The problem of conservation arises in all parts of the sea, as indeed in lakes and rivers, but it only takes on an international aspect when areas of the high seas are involved.[27] In the areas of the sea under the sovereignty of the State -the internal waters and the territorial sea- the adoption and enforcement of conservation measures come within the exclusive competence of the coastal State, seeing that the latter can even reserve the right to exploit the resources for its own nationals. The so-called "contiguous zone", being part of the high seas, is subject to the juridical regime the latter.[28] Accordingly, the international aspect of the conservation problem depends on the status of the waters whose riches are exploited. According to the principle of the freedom of the seas, the nationals of any State are entitled to exploit these riches. In consequence, whenever conservation measures are required to protect them from waste, harm or extermination, a question of competence necessarily arises between the States concerned with regard to the manner in which exploitation shall be regulated and controlled.

The three fundamental cases that may arise

In the light of the present objectives of conservation, a fundamental distincition must be drawn between the following three cases as regards the recognition and delimitation of State competence to regulate and control fishing:

---

27. In lakes and rivers, when they are international or form the common frontier of two or more States, the situation may take a similar or even identical form in that the conservation measures adopted or required may relate to species living or developing in the waters belonging to more than one of the States. When this is the case, the problem can be solved, by analogy, in accordance with the system applying to areas of the high seas.

28. The latter statement naturally does not prevent recognition of special rights of the coastal State in areas "contiguous" to its coast. As will be seen later, when these rights have been recognized, such recognition has been conditioned by the status of high seas which those zones possess. With regard to the "zones of exclusive exploitation" considered in Chapter II, see the considerations put forward at the end of Section 10.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

(a) when the nationals of a single State engage in fishing in a particular zone of the high seas;

(b) when the nationals of two or more States engage in fishing in particular zone of the high seas; and

(c) when the coastal State is among the States interested in the use of the resources of a zone of the high seas either

(i) because its nationals also engage in fishing in that zone, or

(ii) because it has a special interest in maintaining the productivity of the resources exploited, even though its nationals do not engage in fishing in that zone.

The first case presents no difficulty at all, it being merely a question of recognizing the competence of the one State concerned (whether coastal or not) to regulate and control the fishing in which its nationals alone engage. In the second case, since the presence of nationals of various States naturally does not permit the recognition of individual competencies over all the fishing activities, it would be necessary to proceed on the basis of the joint competence of States in the high seas. However, in both cases it may happen, and does frequently happen in practise, that the nationals of third States engage in fishing in a zone where conservation measures have already been taken either unilaterally or collectively. In such a case will those measures apply to the nationals of the third States? From a strictly legal point of view the answer would be no, but, as will be seen later, the existence of certain factors and extra-legal considerations has at times led to the belief that, subject to certain conditions, these measures should be applicable to the nationals of the third States. In the third case mentioned the situation is even more complex in that it cannot always be settled by applying the legal principles traditionally governing the use of the resources of the high seas.

Considerations pointing to the "special interest" of the coastal State

With regard to the third case, the following considerations must be borne in mind. The purpose of international law is to recognize and delimit State competence in those matters which are outside the exclusive sovereignty and jurisdiction of the State, among which the conservation of the living resources of the high seas naturally comes. So far practice has established the system of international co-operation as the means of s ttling the question of competence that arises when two or more States

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

are concerned in the utilization of the resources of a particular zone of the high seas. This concerted action by all the States concerned is the only system that has been considered strictly compatible with the principle of the freedom of the seas. However, as has been seen, the idea of the inexhaustibility of those living resources, an idea which has greatly helped to establish the traditional concept of the absolute freedom of fishing, has proved to be completely devoid of basis in present times. Furthermore, it can be seen in practice that the system of collective regulation for conservation purposes betrays certain loopholes and fundamental deficiencies whenever its rigid application has been attempted, because, among other reasons, it calls for the co-operation of all the States whose nationals engage in fishing in the zone subject to regulation, and this is something that cannot be postulated as an obligation under the principle of the freedom of the seas, Again, to take a somewhat different point, when the present objectives of conservation are considered, it will be seen that within the general concept of the "interested State", recognition has been given to the "special interest" that the coastal State has or may have. All these considerations bring out the need to adpt the traditional concepts and principles of international law to this new state of affairs. In particular, the question of competence under consideration will have to be appraised and settled in the light of the need to ensure adequate safeguards for the two great interests involved: the "general interest" in the optimum sustainable yield of the resources and the "special interest" of the coastal State in maintaining the productivity of those resources in waters near its territory.

The system of international co-operation

As remarked in the previous paragraph, practice so far has established a system of international co-operation as a means of settling the question of competence that arises when various States are interested in using the resources of a particular zone of the high seas. This system was introduced by the Treaty concluded in 1911 between Canada, Japan, Russia and the United States for the purpose of conserving the fur seals of the North Pacific. In 1923 Canada and the United States also signed the International Pacific Halibut Convention of 1923 and in 1937 another Convention on Sockeye Salmon Fishing. To conserve the plaice and flounders in the Baltic, Danzig, Denmark, Germany, Poland and Sweden concluded a Convention in 1929. In 1937 Denmark, Norway and Sweden regulated plaice and dab fisheries by another Convention. During the last ten years or so various other conventions have been signed applying to other regions and other species, such as the International Convention for the Regulation of Whaling (1946), the Inter-American Tropical Tuna Convention (1949), the International Convention for the North West Atlantic Fisheries (1949) and the International Convention for the High Seas Fisheries of the North Pacific Ocean (1953).

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Under some of these instruments councils were set up for technical and scientific research but others established commissions to recommend, manage and enforce conservation measures the particular zone or certain species required, and in some cases to settle any disputes that might arise between the parties. At the present time forty-two different States are parties to these instruments but as some them are parties to two or more, the total number of parties to the various instruments amounts to 78.[29]

Trend in favour of unilateral regulation

In contrast to the system of international co-operation stands the trend to confer on the coastal State the right and responsability of regulating and controlling fishing in the zones of the high seas near to its coast. We naturally do not have in mind the institution described in chapter II as "zones of exclusive exploitation" since their real object is not conservation but to reserve for the nationals of the coastal State, the utilization of the resources of those zones. The trend to which we refer is that which gave rise to the institution of the "contiguous zone for fishery purposes" whose different varients and modes of expression were also referred to at the end of the same chapter. As pointed out at the time, only a relatively small number of States have in practice established "contiguous zones" of this type or have proclaimed the right to take steps to conserve the marine fauna outside their territorial waters. In 1927, Canada, to counteract the effects of trawling in the waters on its Atlantic coast, certain regulations were adopted totally prohibiting trawling within the territorial waters and limiting it to certain seasons of the year in all waters up to 12 miles from the shore. In 1934, Ecuador regulated maritime fishing and hunting in the high seas contiguous to its territorial sea up to a distance of 15 miles, establishing close seasons for catching fish molluscs and crustaceans. However, what really brought the question to the forefront was the United States Proclamation of 28 September 1945 concerning the "policy of the United States with respect to coastal fisheries in certain areas of the high seas". According to this Proclamation, "in view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation

---

29. Cf. Leonard, L.L, International Regulation of Fisheries (publication of the Carnegie Endowment, Washington, 1944), especially Chapter II. See also Report of the Rome Conference, referred to in footnote (22), paragraphs 26-42; and Herrington and Kask, International Conservation Problems and Solutions in Existing Conventions, Doc.A/CONF.10/L.4.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

zones in those are of the high seas contiguous to the coast of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale". It then goes on to state "Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States: and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements".

Similar in tenour is the Icelandic Law of 5 April 1948. According to article 1 of that law, "the Ministry of Fisheries shall issue regulations establishing explicitly bounded conservation zones within the limits of the continental shelf of Iceland: wherein all fisheries shall be subject to Icelandic rules and control". Article 2 likewise provides that "Regulations promulgated under article 1 shall be enforced only to the extent compatible with agreements with other countries to which Iceland may become a party". The right of the State to take conservation measures is also proclaimed in the Costa Rican Legislative Decree of 2 November 1949, repealing that of 27 July 1948 (in this case within a 200-mile zone) and in the Brazilian Degree of 8 November 1950 relating to the waters covering the continental shelf, the Cuban Legislative Decree of 25 February 1954 and the Venezuelan Law of 27 July 1956 relating to zones of the high seas contiguous to the territorial sea.30

As may be seen, all the instruments just mentioned strictly serve the purpose of protecting and conserving the marine fauna in the zones of the high seas indicated. Some, in addition explicitly state that both the enjoyment and exercise of the right of the coastal State to take such measures are without prejudice to any collective regulations of fishing in those zones, that the state may have concluded or may hereafter conclude with other States whose nationals also take part in such activities. Finally, none of them reserve specifically for the coastal State the power of regulating and controlling those activities. The same is not true, however, of the claims made by other States, although there again sole object is the protection or conservation of marine species. Such is the case of the maritime zone established by-

---

30. For the text of the instruments quoted, see United Nations Legislative Series, Laws and Regulations on the High Seas (ST/LEG/SER.B/1), pp. 57 (Canada), 68 (Ecuador) and 112 (United States); Doc.A/2456 (Iceland); Azcarraga, op.cit, p. 276 (Brazil); The Cuban Official Gazette of 25 February 1954 (Cuba); and the Venezuelan Official Gazette of 17 August 1956 (Venezuela).

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

the Santiago Declaration according to the interpretation recently placed upon it, as indicated when we were considering the "zones of exclusive exploitation"[31]. Interpreted as a maritime zone for the sole purpose of conservation, the 200-mile zone, has as its distinctive feature the exclusive character claimed for the right of the coastal State or States to regulate and control maritime fishing and hunting within it. This feature of the claim is further brought out in the position adopted by the countries of the South Pacific seaboard themselves in the international organizations and conferences which have dealt with the question. As will be seen later, other countries have also adopted the same position.

Positions adopted in the Rome Conference

The existence of these different systems for regulating and controlling fishing in the high seas with a view to conservation naturally did not escape the attention of the Rome Conference. Items 12 and 13 of its agenda related specifically to the "international problems" raised by the conservation of fisheries, to the applicability of "international measures and procedures" and to problems of the same kind which such measures and procedures were not adequate to solve. The consideration of these items brought out, as it was bound to, the marked differences of opinion on the point both as regards the practical advantages and drawbacks of each system and as regards their respective juridical validity. Owing to the nature of the Conference and the composition of the delegations, both aspects were merged in the course of discussion, though the arguments employed were mainly technical and scientific. According to the summary of them given in the Report of the Conference, it was argued in favour of unilateral regulation that the coastal State had a special interest in and responsibility for the conservation of the biological wealth near its shores and that it was in consequence the best qualified to be entrusted with the task of conservation. In favour of the system of international co-operation, on the other hand, it was pointed out that conservation measures should be based on scientific and technical evidence, which the coastal State was not necessarily better qualified than other States concerned to assess, and that all States concerned should be entitled to supply pertinent scientific evidence and to have it considered on an equal footing with a view to formulating adequate conservation measures.[32]

But the most important point to bring out in connexion with the question of competence now under consideration is the fact

---

31. See p.... above.

32. Cf. Report of the Conference referred to in footnote 22 above, paragraphs 45 and 47. See also the Records of the Plenary Meetings of the Conference (Docs. A/CONF.10/SR), passim.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

that the currents of opinion evident at the Conference did not always involve an extreme attitude exclusively in favour of one or the other system. Some delegations defending the system of international co-operation admitted of no hypothesis or situation in which it would be appropriate or possible to acknowledge the coastal States power to regulate and control fishing unilaterally. Similarly, some delegations who championed the recognition of that power also categorically denied all right to the other States concerned of participating in the regulation and control fishing conducted in areas contiguous to the shores of the coastal State. Yet other delegations, on the other hand, adopted different attitudes within one or other of these two extreme and exclusive positions.[33] Reflecting this intermediary or eclectic position the delegations of Cuba and Mexico submitted for the Conference's consideration a new system for solving the question of competence. Before setting out the conclusions reached by the Conference let us first see what this new system was.

23. THE SYSTEM OF THE CUBAN AND MEXICAN DRAFT

General character and scope of the proposal

The Cuban and Mexican draft to which we have already had occasion to refer, contains various provisions designed to solve the problem of state competence raised by the conservation of the living resources of the high seas. These provisions occured in the following paragraphs of the draft.[34]

---

33. Cf. Report of the Conference, paragraphs 44-47. See also Records of the Plenary Meetings, especially of the 19th and 21st meetings. (Doc.cit., SR.19 and 21).

34. Cf. Doc. A/CONF.10/GC.1, pp.1-2. In the document submitted for discussion in plenary (Doc.A/CONF.10/GC.1/Rev.1),paragraph 7 was not included, as the Conference had already considered the question of international co-operation for scientific and technical investigation under item 10 of its agenda and had formulated recommendations regarding it (Cf. Report of the Conference, Chapter III). The revised draft, on the other hand, contained a new paragraph 1 wordel as follows: "In addition to the objectives already stated by the Conference, fishery conservation programmes must also tend to and fundamentaly be based upon the maintenance of the existing ecological systems in the various maritime zones." The subsequent paragraphs of this document (2, 3, 4 and 5) correspond to the paragraphs 3, 4, 5 and 6 reproduced above.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

"3. The nature and scope of the problems involved in the conservation of the living resources of the sea is such that there is a clear necessity that they should be solved primarily on a basis of international co-operation, through the concerted action of all States concerned.

4. Study of the last fifty years experience and recognition of the great variety of conditions under which conservation programmes have to be applied, clearly indicate that these programmes can be more effectively carried out for separate species or on a regional basis. Naturally, the degree to which international conservation agreements are necessary, the scope of such agreements and the number of parties to them may vary considerably according to the region or species in question.

5. Where the States concerned have not agreed as to the measures for the conservation of the living resources of the sea, the coastal State may adopt those measures which are based on scientific and technical principles, when the need of conserving these resources becomes imperative. The measures which the coastal State adopts under such conditions must not discriminate against foreign fishermen.

6. In the case of differences between the coastal State and other States concerned, or between States which are parties to an international agreement and third States, either on the scientific and technical justification of the measures adopted, or on their nature or scope, such differences should be settled by appropriate technical bodies of an international character.

7. International co-operation for the investigation and formulation of scientific and technical principles should be encouraged, preferably on a regional basis. Such principles may serve as a guide for drafting international agreements, and as a guide to coastal States seeking to adopt proper conservation measures, or for the purpose of settling differences which may arise between the various States in this regard."

The wording of the draft and even certain substantive aspects of it had naturally to be adapted to the scientific and technical character of the Conference. Although the proposal envisaged the elaboration of a juridical system on that occasion it was inexpedient to do more than lay down the fundamental bases and principles derived from scientific and technical experience in the matter of conservation and from the economic and social factors involved. Accordingly the proposal made no attempt in the second part to outline the juridical system which was to solve the problem of conservation in all its aspects and in the different circumstances under which it arose in practice. The same consideration likewise conditioned the presentation and explanation of the draft by its sponsors. In order to keep within the explicit terms of reference of the Conference, they also refrained

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

from considering the juridical implications of the technical and scientific thesis underlying the draft. These facts will undoubtedly make it simple to grasp the true character and scope of the system proposed.[35]

Point of departure and objects of the system

The draft took as its point of departure the need to establish a system which would cater for the technical and scientific aspect of the conservation of the living resources of the high seas without neglecting its social and economic aspects. In this respect the nature and scope of the problem of conservation, both from the scientific and technical standpoints and from the point of view of the interests involved in the utilization of the living resources, point to the need to solve the problem primarily through the medium of concerted action of all the States concerned. In this way international co-operation is recognized as constituting the basic principle of the system. Following up this idea, the draft points out, on the basis of practical experience with this principle, that the collective programmes or measures of conservation must be of a regional character or relate to particular species.

Now experience also shows that the States concerned in utilizing the resources may not agree on the conservation measures to be adopted. The system of international co-operation pure and simple offers no solution in such cases when there is an imperative or urgent need to adopt such measures. The only way out of such a situation seems to be to authorize the coastal State, which by reason of its geographical propinquity will generally have a special interest in maintaining the productivity of the resources in areas of the high sea contiguous to its territorial sea, to adopt whatever measures it sees fit. In introducing this innovation to the traditional position, the draft did not however ignore the general interest, and with it in mind made the unilateral action of the coastal State subject to the fulfilment of certain conditions in addition to the two already indicated: that the measures be based on scientific and technical principles and that they do not discriminate against foreign fishermen. To ensure observance of these conditions by the coastal State in the practical exercise of its power, it was stipulated that, in the event of fisputes between that the State and the other States concerned, concerning the measures adopted by the former, the disputes should be settled by an international body.

It will be readily undestood that the Cuban and Mexican draft was designed not only to fill a gap in the system of international co-operation but also to ensure adequate protection of all the

---

35. See Records of the 20th and 21st Plenary Meetings, Docs. A/CONF.10/SR.20 and 21.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

interests involved in the utilization and conservation of the living resources of an area of the high seas. The special interest that the coastal State might have in maintaining the yield of the resources near to its coasts, already acknowledged by the conference, was safeguarded by the recognition of a power not enjoyed by the other States whose nationals engaged in exploiting those resources . At the same time the interest of the latter States was protected by the conditions to which the unilateral action of the coastal State was subject and by the obligation to settle any disputes to which the measures adopted might give rise through the medium of an international body.

The discussion of the draft

During the discussion, the Cuban and Mexican draft was supported by the delegations which had argued in favour of recognizing the special interest of the coastal State in formulating conservation programmes.[36] In the view of these delegations this second part of the draft rounded off the decision taken by the Conference in recognizing this special interest and, as some of them pointed out, defined and specified both the circumstances in which the coastal State could adopt conservation measures unilaterally and the conditions and limitations to which the validity of those measures remained subject. In this way they showed that the system as a whole acknowledged the general interest as well as the special interest of the coastal State. Their statements dispelled all doubt regarding the real scope or purpose of the draft.[37]

It is also interesting to note that the delegations which did not support the proposal refrained almost to a man from passing judgment on its substance. When defining their position they

---

36. The following delegations intervened in support of the draft: Brazil, Peru, Iceland, India, El Salvador, Chile, Argentina, Ecuador, Yugoeslavia, Indonesia, Korea and Colombia. Cf. Record of the Twenty-first Plenary Meeting, p. 4 et seq.

37. For example to show erroneous was the suggestion that the draft implied an extension of the sovereignity of coastal States beyond their jurisdictional waters one of the sponsors of the draft, the Mexican representative, explained that "this proposal in no way affects the status of the maritime zones concerned as part of the high seas. It does not even stipulate the ownership of the products of the sea by the coastal States, as is quite clear from the fact that it does not establish any privilege on behalf of the nationals of coastal States as regards fishing and in fact expressly prohibits discrimination against foreign fishermen". Cf. Record of the Twenty-first Plenary Meeting, p. 13.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

expressed the view that the draft involved questions of a juridical nature which as such were outside the Conference's terms of reference.[38] It is also of interest to observe in this connexion that even though such an attitude might implicity involve objections to the substance, not all delegations had such objections. Some of them, in fact, when explaining that they could not support the draft, indicated their acceptance of the general ideas it contained.[39]

The procedural question raised in connexion with the draft

At the close of the debate, the Norwegian delegation pressed for the Conference first to decide on the question of its competence, which the delegation had raised at the beginning of the discussion. Despite the reasons put forward to show the desirability of voting on the draft itself, and especially the fact that the Chairman himself had submitted formal proposals to the Conference which were more or less open to the same objections as the Cuban and Mexican draft 40, the Chairman decided to take a vote on the question raised by his delegation. When put to the vote, the motion that the Conference was incompetet to deal with the subject was carried by 21 votes to 20 with 3 abstentions.[41]

---

38. The following delegations spoke in opposition to the adoption of the draft: Norway, Sweden, Soviet Union, Canada, Netherlands, Poland, United States, United Kingdom, Japan, France, Honduras, Spain, Australia, Union of South Africa, China, Italy and Panama. Cf. Record of the Twenty-first Plenary Meeting, p. 3 et seq.

39. See the statements of Canada, Honduras and Australia, Record of the Twenty-First Plenary Meeting, pp.7, 13 and 14 respectively.

40. See docs. A/CONF.10/L.23 and CC.12.

41. The following voted in favour: United States, Canada, Denmark, Egypt, France, Federal Republic of Germany, Greece, Israel, Italy, Japan, Monaco, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Turkey, Union of South Africa, Soviet Union and the United Kingdom; against: Uruguay, Yugoeslavia, Argentina, Australia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Iceland, Indonesia, Korea, Mexico, Panama, Paraguay and Peru; and the following abstained: China, Honduras and Nicaragua. Cf. Record of the Twenty-first Plenary Meeting, pp.17 and 18.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

When this procedural decision is viewed objectively it is not difficult to see the error committed in depriving the Conference of an ooportunity of passing judgement on the various questions raised by the Cuban and Mexican draft. Since the Conference had accepted the idea of the special interest of the coastal State and, without anyone casting doubt on its competence, had considered the conventions and agreements comprising the system of international co-operation, there was no reason why the draft should be regarded as "juridical" and not these other matters. Above all, however, once the special interest of the coastal State was acknowledged, it became necessary to define its position within the traditional system to see when and how it could assert that interest and in what manner the general interest woul be safeguarded. Continuation of the debate and a vote on the various aspects of the draft would have enabled an appropriate solution to be found to all those problems. Be that as it may, the Conference in its Report formulated certain observations and general conclusions which threw sufficient light on the question under consideration and which can offer valuable guidance to those bodies responsible for envolving the juridical system applying to the conservation of the living resources of the sea.

Conclusions of the Conference on the substantive question

Referring to the system of international co-operation, the Conference brought out very clearly the loopholes and weaknesses which it offered in practice and to which we drew attention in the previous section. In that connexion it stated that "Failure of all States concerned to participate in the preparation, negotiation and establishment of international fishery conservation conventions impedes or limits progress in achieving the objectives of conservation." On the same point the Conference expressed itself in even more categorical terms with reference to the biological and geographical coverage of convention. In its opinion, "Lack of co-operation by any State participatin in fishing on the stocks of fish or in the areas covered by the conventions may result in the conventions becoming ineffective. Scientific evidence clearly demosbrates that effective conservation management of a stock of fish cannot be achieved unless all States engaged in substantial exploitation of that stock come within the management system".[42]

The foregoing, of course, in no way implies any direct or indirect judgment on the merits of the system of international

---

42. Cf. Report of the Conference, paragraph 50 and 54 respectively.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

co-operation, nor indeed any adverse view on its general efficacy and desirability. It merely involves the recognition of a fact brought to the fore by the experience of half a century, namely, that the system in effective and can yield fully satisfactory results only when all the States exploitin the resource or the area in question on a large scale collaborate and participate in it. Perhaps this explains the statement made by the Conference in the chapter containing its general conclusions to the effect that:43

"The Conference notes with satisfaction conservation measures already carried out in certain regions and for certain species at the national and international level. International co-operation in research (including statistical investigation) and regulation in the conservation of living resources of the high seas in essential. The Conference considers that wherever necessary further conventions for these purposes should be negotiated."

Though this statement is not exactly crystal clear and precise, there can nevertheless be no doubt regarding the general ideas it seeks to express. In other words, while it does not envisage or explicitly settle the different aspects of the question of competence raised in the Conference, it does deal with the problem of principle that had to be decided before the responsible bodies could start to evolve the juridical system applying to the conservation of the living resources of the high seas.

Thus, the Conference declared the system of international co-operation to be essential, i.e. that all the States concerned in the utilization and conservation of the resources of an area of the high seas must collaborate in the pursuit of scientific and technical research and adopt by agreement the appropriate conservation and programmes. Now, as the Conference also admitted, "the conservation measures already carried out in certain regions and for certain species at the national level" are not necessarily opposed to or incompatible with this basic postulate.44 In defining the objectives of conservation, the Conference brought out the duality of interests involved. In accordance with this concept it then laid down the fundamental postulates on which a juridical

---

43. Ibid, paragraph 7

44. The phrase "at the national and international level" did not appear in the original text submitted to the Conference; it was included therein on the proposal of the delegation of Iceland. Cf. Record of the Twenty-third Plenary Meeting, p. 3.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

co-operation, nor indeed any adverse view on its general efficacy and desirability. It merely involves the recognition of a fact brought to the fore by the experience of half a century, namely, that the system in effective and can yield fully satisfactory results only when all the States exploitin the resource or the area in question on a large scale collaborate and participate in it. Perhaps this explains the statement made by the Conference in the chapter containing its general conclusions to the effect that:43

"The Conference notes with satisfaction conservation measures already carried out in certain regions and for certain species at the national and international level. International co-operation in research (including statistical investigation) and regulation in the conservation of living resources of the high seas in essential. The Conference considers that wherever necessary further conventions for these purposes should be negotiated."

Though this statement is not exactly crystal clear and precise, there can nevertheless be no doubt regarding the general ideas it seeks to express. In other words, while it does not envisage or explicitly settle the different aspects of the question of competence raised in the Conference, it does deal with the problem of principle that had to be decided before the responsible bodies could start to evolve the juridical system applying to the conservation of the living resources of the high seas.

Thus, the Conference declared the system of international co-operation to be essential, i.e. that all the States concerned in the utilization and conservation of the resources of an area of the high seas must collaborate in the pursuit of scientific and technical research and adopt by agreement the appropriate conservation and programmes. Now, as the Conference also admitted, "the conservation measures already carried out in certain regions and for certain species at the national level" are not necessarily opposed to or incompatible with this basic postulate.44 In defining the objectives of conservation, the Conference brought out the duality of interests involved. In accordance with this concept it then laid down the fundamental postulates on which a juridical

---

43. Ibid, paragraph 7

44. The phrase "at the national and international level" did not appear in the original text submitted to the Conference; it was included therein on the proposal of the delegation of Iceland. Cf. Record of the Twenty-third Plenary Meeting, p. 3.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

system serving such objectives must be based. As we shall see in the next few sections, these ideas constituted the great contribution of the Rome Conference to the task to be performed a month later at Geneva by the United Nations International Law Commission.

24. RECONSIDERATION OF THE QUESTION BY THE INTERNATIONAL LAW COMMISSION

The fraf prepared by the Commission in 1953

At its third session (1951), the International Law Commission drew up a preliminary draft on resources of the sea to enable governments to submit their comments on it prepared the draft that it was to submit for the consideration of the General Assembly.[45] At its fifth session (1953), the Commission reconsidered the topic, though the system of the fraft approved at that session ramaind the same as it had proposed in 1951. The text of the 1953 draft was as follows:[46]

Article 1

A States whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engated, may regulate and control fishing activities in such areas for the purpose of protecting fisheries against waste or extermination. If the nationals of two or more States are engaged in fishing in any area of the high seas, the States concerned shall prescribe the necessary measures by agreement. If, subsequent to the adoption of such measures, nationals of other States engage in fishing in the area and those States do not accept the measures adopted, the question shall, at the request of one of the interested parties, be referred to the international body envisaged in article 3.

Article 2

In any area situated within one hundred miles from the territorial sea, the coastal State or States are entitled to take part on an equal footing in any system of regulation, even though their nationals do not carry on fishing in the area.

---

45. The text of the preliminary draft figures in the Report of the Commission covering the work of its Third Session, Doc.A/1858, p.20; and the comments of governments in the Report covering the work of its Fifth Session, Doc.A/2456, annex II.

46. The text of the draft, together with the Commission's Commentary, appears in the 1953 report, Doc. A/2456, pp.12-19.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Article 3

> State shall be under a duty to accpet, as biding upon their nationals, any system of regulation of fisheries in any area of the high seas which an international authority, to be created within framework of the United Nations, shall pre scribe as being essential for the purpose of protecting the fishing resources of that area against waste or extermination. Such international authority shall act at the request of any interested State.

As pointed out in the Introduction, the General Assembly has never passed judgment on the substance of the question. In Autumn of the same year, it decided not to deal with any of the problems relating to the high seas until they had all been studied by the Commission and reported upon by it to the Assembly (resolution 798(VIII)). At its ninth session (1954), basing itself on the same criterion of the unity of the subjects relating to the sea, it requested the Commission to devote the necessary time to the study of those topics in order to complete its work on them and submit its final report in time for the General Assembly to consider them as a whole at its eleventh session (resolution 899 (IX)).[47] It will also be recalled that on the same occasion the Assembly decided to convene an international technical conference at Rome to study the technical and scientific aspect of the problem of conserving the living resources of the sea so that the Commission would have new material at its disposal for studying the problems (resolution 900 (IX)). In that connexion, resolution 900 (IX) contained an explicit instruction from the General Assembly that the International Law Commission should "take into account" any conclusions and recommendations formulated by the Rome Conference. The Commission accordingly was to reconsider the problem of the conservation of the living resources of the sea in the light of those conclusions and recommendations, which is what it did when it had received the report of the Conference.

Text of the proposal which we submitted to the Commission at its seventh session (1955

In the early stages of the discussion of the topic, we submitted a proposal departing in certain fundamental respects from the draft approved by the Commission in 1953 but at the same time remaining faithful to such concepts and principles of that draft as were compatible with the conclusions and recommendations of the Rome Conference. The Commission adopted the proposal as a basis for discussion and later approved it with some amendment which will be reviewed in the next section. To facilitate the

---

47. See p.... above.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Commentary on them, the text of the proposal in question is reproduced below:[48]

Considering that

1. The development of modern techniques for the exploitation of the living resources of the sea has exposed some of these resources to the danger of being wasted, harmed or exterminated,

2. It is therefore necessary that measures for the conservation of the living resources of the sea should be adopted when scientific evidence indicates that they are being or may be exposed to waste, harm or extermination,

3. The primary objective of conservation of the living resources of the sea is to obtain the optimum sustainable yield so as to obtain a maximum supply of food and other marine products in a form useful to mankind.

4. When formulating conservation programmes, account should be taken of the special interest of the coastal State in maintaining the productivity of the resources of the high seas contiguous to its coast,

5. The nature and scope of the problems involved in the conservation of the living resources of the sea are such that there is a clear necessity that they should be solved primarily on a basis of international co-operation through the concerted action of all State concerned, and the study of the experience of the last fifty years and recognition of the great variety of conditions under which conservation programmes have to be applied clearly indicate that these programmes can be more effectively carried out for separate species or on a regional basis.

Article 1

If the nationals of two or more State are engaged in fishing in any area of the high seas these States shall prescribe by agreement the measures necessary for the conservation of the living resources of the sea.

Article 2

If, subsequent to the adoption to the measures referred to in article 1, nationals of other States engage in fishing in the same area and such States do not accept the measures so adopted, the questions shall be submitted to the methods and procedures envisaged in articles 6 and 7 at the request of one of the interested parties.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Article 3

If a coastal State has a special intereste in the maintenance of the productivity of the resources of the high seas contiguous to its coast, such State is entitled to take part on an equal footing in any system of regulation, even though its nationals do not carry on fishing in the area.

Article 4

Where the States concerned have not agreed as to the measures for conservation, and if the coastal State has a special interest of the productivity of the resources of the high seas contiguous to its coast, such State may adopt whatever measures of conservation are appropriate.

Article 5

The measures which the coastal State adopts under Article 4 shall be valid as to other States only if the following requirements are fulfilled:

(a) That scientific evidence shows that there is an imperative and urgent need for such measures.

(b) That such measures are based on appropriate scientific findings.

(c) That such measures do not discriminate against foreign fishermen.

Article 6

"In case of differences between the coastal State and other States concerned or between States which are parties to an international agreement and third States, either on the scientific and technical justification for the measures adopted, or on their nature or scope, such differences shall be settled in accordance with the provisions of article.7.

Article 7

(General directives for the formulation of this article)

Obligation to accept Arbitration

"In the resolution adoptin this article, the General Assembly would invite States to conclude general or special agreements stipulating that the differences referred to in article 6 must be submitted to arbitrarion.

Composition of Technical Arbitration Boards

(a) A technical Arbitration Board composed of qualified experts on the subject would be set up.

/(b) On

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

(b) On this Board the States concerned would have equitable, and where advisable, equal representation. (Rule similar to that laid down by the Charter with regard to the Trusteeship Council).

(c) The Chairman of the Board would be appointed by the Secretary-General of the United Nations is consultation with the Director-General of FAO, as would also the arbitrators when the parties have failed to appoint them within a reasonable time.

Procedure

"The Board shall take up its duties with the least possible delay, and shall lay down its own rules of procedure in consultation with the parties.

Competence

"The Board shall be competent to deal with any difference relating to the questions referred to in earlier articles.

Validity of Findings

"The findings of the Board shall be final and without appeal, and shall be binding on the States concerned, except where the said findings are in the nature of recommendations. Nevertheless, recommendations by the Board must receive the greatest possible consideration."

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

As can be seen, the proposal was substantially the same as that submitted in Rome by the Cuban and Mexican delegations. To be exact, it differed only from a formal standpoint. As explained in the previous section, the wording of the Cuban and Mexican draft had of necessity to be kept in line with the terms of reference of the Conference. When the same system was proposed to the Commission, however, a text had to be submitted which covered all the legal aspects and implications of the system.

The main principles underlying the proposal

The object of the proposal was to embody the scientific and tenhnical and social and economic elements in the problem of conservation brought out by the Rome Conference, and at the same time to adapt to the present objective of conservation, as far as necessary and possible, certain traditional principles of the International law of the sea. This object was largely stated in the preamble to the text. Its first two paragraphs drew attention to the danger to which some of the living resources of the sea were exposed as a result of the development of fishing technique and to the indicated that exploitation of some of the resources might to their being exposed to waste, harm or extermination. Paragraphs 3 and 4 stated the objectives of conservation in accordance with the definition formulated by the Rome Conference, emphasizing that the primary objective was to obtain the optimum sustainable yield of the living resources of the sea in a form useful to mankind, but that when conservation programmes are formulated account should be taken of the special interest of the coastal State in maintaining the productivity of the resources near to its coast. This duality of interest is again recognized in the last paragraph of the preamble, where it is stated that the problems now involved in conservation clearly point to the necessity of their being solved primarily on the basis of international co-operation thorough the concerted action of all States concerned. In this way, while upholding the principle of international co-operation as a fundamental rule, the proposal did not exclude the posibility of the unilateral action of the coastal State in circumstances which we will describe later.49

As far as the provisions relating to the principle of international co-operation were concerned, the proposal did not differ substantially from the Commission's draft. Both stipulated that when the nationals of two or more States are engaged in fishing in any area of the high seas, the States concerned shall prescribe by agreement the necessary measures for conservation and that if,

---

49. A general introduction to the proposal is to be found in the two Summary Records referred to in the previous footnote.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

subsequent to the adoption of such measures, nationals of other States engaged in fishing and those States did not accept the measures adopted, the question shall be referred to the methods and precedures of settlement provided for in each draft. These provisions apart, the system in our proposal departed considerably from that proposed by the Commission. The differences, as will be seen further on, are noticeable with respect both to the substantive and to the procedural provisions.

Recognition and protection of the special interest of the coastal State

Let us first see the position enjoyed by the coastal State in the Commission's draft. In its 1953 report, the Commission had stated that the system it proposed "protects, in the first instance, the interest of the coastal State which is often most directly concerned in the preservation of the marine resources in the areas of the sea contiguous to its coast".50 But what was the nature and scope of the recognition and protection accorded the special interest of the coastal State? Article 1 of the draft authorized that State to regulate and control fishing with a view to conservation in any area of the high seas where the nationals of other States did not fish. In reality, although the Commission in its commentary on the article explicitly attributed the right to coastal State, it was not a special or exclusive right accorded to that State, for any State whose nationals were the only ones to fish in a broad zone could also take unilateral measures to regulate and control fishing activities there. Article 2, on the other hand, does envisage the particular case of the coastal State and furthermore explicitly recognizes its special interest. It does these two things by stating: "In any area situated within 100 miles from the territorial sea, the coastal State or States are entitled to take part on an equal footing in any system of regulation, even if their nationals do not carry on fishing in the area". As pointed out by the Commission in its commentary, "this provision is considered to safeguard sufficiently the position of the coastal State. Such protection of its interests is equitable and necessary even if, for the time being, its nationals do not engage in fishing in the area".51

It is not difficult to see that the criterion adopted by the Commission to protect the special interest of the coastal State was not really an effective means of ensuring fair and necessary protection and was not strictly logical from the standpoint of the true nature of the interest intended to protect. We shall return

---

50. Cf. Doc. referred to in footnote 45 (A/2456), paragraph 98.

51. Ibid., paragraph 101.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

later to the question of the efficacy of the safeguard; for the moment let us confine ourselves to the second aspect of the criterion adopted by the Commission. From the logical standpoint, can the special interest of the coastal State really be measured or determined by the distance from its territorial sea at which the resources can be found? While the distance of 100 miles is more than sufficient in most cases, there may be, and indeed are, times when it is not. Everything depends on the marine species in question, on the area in which they develop or on some other factor. Similarly, it may frquently occur that the coastal State has no interest at all in maintaining the productivity of the resources in the whole of this broad zone, in which case the Commission would be gratuitously according it a right, i.e. giving it a privilege which it might claim and assert for purposes other than that of conservation. Accordingly some other criterion ought to be sought which would make it possible to determine in a rational manner when this special interest of the coastal State existed.

In the specific case we are considering, such a criterion could be no other than the general one formulated by the Rome Conference, namely that the special interest exists when the maintenance of the productivity of the resources of the high seas near the shores of the coastal State, regardless of the actual distance at which they are to be found, is a factor of fundamental or considerable importance for the economy of that State or for the feeding of its population. By including that criterion in the corresponding provision of our proposal (article 3) we not merely recognized the right of the coastal State to take part on an equal footing in any system of regulation for the reason that really determined its special interest, but at the same time we avoided the posibility of a coastal State which did not have a special interest in the whole of an arbitrarily pre-delimited zone making use of and abusing that right. So far, however, there are no really irreconcilable differences between the two drafts. Such differences are to be found rather in connexion with other rights which our system acknowledged the coastal State to posses and, though they are of a different kind, in connexion with the corresponding procedural provisions. But before seeing in what those differences consisted, let us first outline the considerations that prompted us to propose the adoption of a new system.

Loopholes and definciencies in the traditional system

The Commission's draft was based on the supposition that the system of collective regulation in the strict sense of the term, as provided for in its three articles, was perfectly able to provide a satisfactory solution to the problem of conservation; that it was system which, by itself alone, sufficed effectively to regulate fishing in all situations and circumstances that

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

might arise; and that, at all events, in the case of areas of the high seas exploited by the nationals of more than one State, it was the only system compatible with the principle of the freedom of the seas. The basis of these premises was as follows: first, that no State has the right to regulate the fishing activities of the nationals of other States; second, that those States whose nationals engage in fishing in the same area of the high seas must agree together on the measures to be adopted; and third, that when the latter is not possible for any of the reasons mentioned in articles 1-3 of the fraft, the system of regulation prescribed as being essential by the international authority referred to in the second article should be compulsorily applied. It will easily be seen that the suppositions or premises on which the Commission based its draft are not exactly in accord with the legal and political facts of the present position of the problem of conserving the living resources of the sea.

When the attempt is made to apply the system of international co-operation or collective regulation in the rigid manner envisaged in the Commission's draft, it does in fact reveal certain loopholes and inadequacies. Let us briefly explain what we mean. The obligation on all the States concerned to agree on conservation measures comes in the category of what may be called "imperfect" obligations under international law, because their fulfilment does not mean that the ultimate end pursued in establishing them will be really achieved. States can be compelled to "negotiate" but not to "agree", because the latter is something which cannot be the subject of an obligation. Although they may be placed under the obligation of co-operating for the collective achievement of a common end, there are no means of enforcing that obligation. Once it is imposed, all that can be demanded of States is that they negotiate and continue to negotiate indefinitely, since the duty to come to an agreement is something that cannot be imposed within a contractual system such as that we are considering. Accordingly, as the Rome Conference pointed out in its report, it is sufficient for one of the States concerned not to agree with the other and to refuse to accept the measures on which they are agreed for that State to be able to render the conservation programme accepted by the others inoperative and ineffective and, of course, any State may oppose the collective measures on the pretext of the same principle traditionally invoked in order to deny the compulsory nature of the unilateral measures adopted by a State.

The Commission itself implicitly admitted this loophole or deficiency in the system and to overcome it proposed the creation within the framework of the United Nations of an international authority which would intervene at the request of any of the States concerned and would be competent to prescribe as essential conservatory measures which States would be under a duty to accept as binding upon their nationals (article 3). The Commission remarked in this connexion in its report that "Article 3 is intended to provide effectively for the contingency of the

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

interested States being unable to reach agreement. In such cases, the regulations are to be issued, with binding effect, by the international authority envisaged in that article".[52] The solution proposed by the Commission is without a doubt intrinsically good. It might even be admitted that, taken in the abstract, it is the best, but in international relations the best solution is not always feasible and in this case there were serious grounds for thinking that it would no be. The idea of setting up an international authority of the type and with the competence contemplated in article 3 of the draft certainly did not find a favourable reception among the Members of the United Nations. Indeed, the majority was opposed to it: some of its members because they were not prepared to delegate the unilateral or joint power of regulating fisheries to an international authority; others because they sincerely believed that conservation problems by their very nature called for ad hoc systems and procedures of a regional nature and applying to particular species. What is more, those opposed to the idea included both coastal States and States with interests in overseas fishing, which means that its acceptance would have satisfied neither of those two categories of States concerned in conservation.[53]

But even supposing for the moment that the idea were accepted and that the international authority were successfully set up, as could have occurred if a majority of the United Nations had so decided. Would then the compulsory jurisdiction of the body have extended to the States, whether Members of the United Nations or not, which had not consented to its establishment? And would its decisions be valid and effective for all the States concerned in exploiting an area of the high seas even if some of them had not accepted its jurisdiction? The situation is similar to, and in some respects identical with, that arising with an international convention to which not all the States concerned are parties. The jurisdiction of such a body, and its decisions if they are to be enforceable, would have to have been previously accepted by the State concerned, as happens in any other type of international relation where a dispute has to be settled. Consequently, the solution offered by the Commission's draft in order to fill up the loopholes in the system of international co-operation itself raised a practically identical problem.

The freedom of fishing and the doctrine of the "abuse of the right".

What is to be done, then, when the system of international co-

---

52. Ibid, paragraph 98.

53. See in this connexion the comments of Governments on the Commission's 1951 draft, reproduced in annex II to its 1953 report (Doc.A/2456), p. 42 et seq.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

operation, through any of the circumstances mentioned, proves inoperative, or during the time before it begins to work and be effective? Is the unrestricted enjoyment of the freedom to fish to be allowed if there is an imperative or urgent need to take conservatory measures? Viewing such a situation objectively, we cannot see how that could be permitted, since it would mean subordinating the interests in the conservation of the riches of the sea to the interests in their exploitation, as is occasionally done for purely commercial and private ends. The Commission itself had admitted the need to prohibit abuse of these rights when referring to the case of "a State which arbitrarily and without good reason, in rigid reliance upon the principle of the freedom of the seas, declines to play its part in measures reasonably necessary for the preservation of valuable, or even essential, resources from waste and exploitation".[54] For, it is also clear at the present day that a State which, relying on the same principle, refuses to apply conservation measures adopted by others in the circumstances and under the conditions which we shall shortly consider, is in fact abusing the right to freedom of fishing. The freedom to fish, conceived as an absolute right stems from a view of the living resources of the sea and of their utilization and conservation which conflicts with present-day facts. The time when such resources could be regarde as inexhaustible is long past. The technique of fishing has developed to such an extent that nowadays nobody can possibly believe that the unrestricted enjoyment of the freedom to exploit the living resources of the sea does not have repercussions on the life, development and yield of certain species. In other words, although in former times it was not possible, so to speak, to "abuse" of this freedom it certainly is to-day. If, formerly, there was therefore no justification for taking steps to prevent abuse of the right, nowadays, on the contrary, such steps may prove necessary and justified.

The right to take unilateral action and the protection of the interests and rights of third parties

When the same situation is considered from the standpoint of the interests of the coastal State, it is even more difficult to admit the unrestricted exercise of the freedom to fish, particularly in those cases in which the maintenance of the productivity of the resources contiguous to its coast is a factor of vital or considerable importance for the economy of the State or for the feeding of its population. For all these reasons and in view, moreover, of the general statement made by the Rome Conference on that point, our proposal accorded the coastal State a right of an exceptional nature. According to Article 4 of the

---

54. Cf. Doc.cit., paragraph 100.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

proposal, "where the States concerned have not agreed as to the measures for conservation, and if the coastal State has a special interest in the productivity of the resources of the high seas contiguous to its coast, such State may adopt whatever measures of conservation are appropriate". In proposing this provision we were, of course, by no means blind to the fact that recognition of such a power was extremely dangerous in the sense that we were authorizing an extension of State competence in the high seas that might lead to enjustified restrictions on the freedom to fish. In reality, however, the danger lies not in the actual recognition of this power but in the possibility that the coastal State may exercise it in an arbitrary or capricious manner, i.e. when the circumstances referred to do not exist or, when they do exist and the State does not comply with certain conditions which are also essential in order to prevent unjustified restriction of the freedom to fish. That being so, there was no need to worry about the recognition of the power whose exercise, like that of any State competence, could be so regulated as not to affect the legitimate interests of third parties.

This was precisely what the remaining provisions of the proposal were intended to do. For us it was as important to recognize the coastal State's right to take conservation measures as it was to prevent that State from exercising the right for other ends or in a manner contrary to its true purpose. In one of those provisions were listed the conditions which conservation measures must fulfil in order to be valid for other States. They were: (a) that scientific evidence shows that there is an imperative and urgent need for such measures; (b) that such measures are based on appropriate scientific findings; and (c) that such measures do not discriminate against foreign fishermen (Article 5).

The first of these conditions has been referred to on several occasions, especially in connexion with the other circumstance which must be present before the right of the State to take unilateral action can exist. In other words, it is not sufficient for the coastal State to be negotiating with the other States concerned on collective regulation of the fishing in an area of the high seas contiguous to its coast, it is also necessary for adequate scientific evidence to be at hand showing the imperative or urgent need to undertake the regulation immediately without prejudice to the collective measures that may be later adopted. The second condition is also fundamental. Any conservation measure adopted must have a scientific basis justifying the limitations on fishing activities to which it is bound to give rise.55 The

---

55. See in this connexion chapters III and IV of the Report of the Rome Conference which deal respectively with the "types of scientific information required for a fishery conservation programme" and "types of conservation measures applicable in a conservation programme".

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

third and last condition is largely self-evident. The conservation measures must be applied generally because the nationality of those engaging in the exploitation of an area of the high seas is, strictly speaking, a factor quite extraneous to the problem of conservation. However, it is not entirely unnecessary to lay down this condition in so many words in order to prevent the measures adopted from excluding foreign fishermen in some indirect way, or subjecting them to a special regime.

Method for settling disputes: Compulsory arbitration

Articles 6 and 7 of the proposal relate to the settlement of any disputes that might arise between the coastal State and other States concerned or between the States parties to a Convention and third States. These provisions, designed to perfect and render the system of international co-operation more feasible and effective, offer an additional safeguard against the adoption or application of unilateral measures contrary to the previous provisions of the proposal. Thus, the coastal State is prevented from assessing and deciding without right of appeal as to the scientific and technical justification of the measures it adopts or as to their nature and scope. Article 6 laid down in unambiguous terms the obligation of the parties to settle their differences in accordance with the method and procedure laid down in article 7. As wil be recalled, the latter article was couched in the form of general directives designed to help in fraiming the actual text in the course of discussion. That being so, it will enough now for us to bring out the more outstanding features of those directives, though we may have to return to them when considering the corresponding provisions of the text approved by the Commission.

The article envisaged, in the first place, the obligation to submit the differences referred to in article 6 to arbitration by the optional clause system as in the case of acceptance of compulsory jurisdiction of the International Court of Justice (article 36 of the State of the Court). However, once the original obligation to accept arbitration was entered into -an obligation to which the recognition of the coastal States right was naturally subject- the constitution and working of the arbitration board would not hang on the agreement of the parties if they failed to reach such agreement within a reasonable time. Its findings would, furthermore, be binding on the States concerned, except when couched in the form of a recommendation. As may be seen, compulsory arbitration was the principle designed to perfect the system in the case not only of unilateral measures but of any States who might be parties to a dispute over the adoption application of conservation measures.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

25. SYSTEM OF THE NEW DRAFT OF THE INTERNATIONAL LAW COMMISSION

On terminating its general discussion, the Commission appointed an ad hoc Committee to study my proposal in the light of the comments made on it during the debate. The text prepared by the Committee was also discussed at length and approved article by article. Before the close of the session, the Commission approved the final text of the draft which is reproduced below.[56]

The draft approved in the seventh session (1955)

The International Law Commision

Considering that

1. The development of modern techniques for the exploitation of the living resources of the sea has exposed some of these resources to the danger of being wasted, harmed or extermined,

2. It is necessary that measures for the conservation of the living resources of the sea should be adopted when scientific evidence indicates that they are being or may be exposed to waste, harm or extermination.

3. The primary objective of conservation of the living resources of the sea is to obtain the optimum sustainable yield so as to obtain a maximum supply of food and other marine in a form useful to mankind,

4. When formulating conservation programmes, account should be taken of the special interest of the coastal State in maintaining the productivity of the resources of the high seas contiguous to its coast,

5. The nature and scope of the problems involved in the conservation of the living resources of the sea are such that there is a clear necessity that they should be solved primarily on a basis of international co-operation through the concerted action of all States concerned, and the study of the experience of the last fifty year and recognition of the great variety of conditions under which conservation programmes have to be applied clearly indicate that these programmes can be more effectively carried out for separate species or an a regional basis,

---

56. Cf. Report covering the work of its Seventh Session (Doc. A/2934), Annex to chapter II.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

has adopted the following articles:[11]

Article 1

A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged may adopt measures for regulating and controlling fishing activities in such areas for the prupose of the conservation of the living resources of the high seas.

Article 2

1. If the nationals of two or more State are engaged in fishing in any area of the high seas, these States shall, at the request of any of them, enter into negotiations in order to prescribe by agreement the measures necesaary for the conservation of the living resources of the high seas.

2. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure envisaged in article 7.

Article 3

1. If, subsequent to the adoption of the measures referred to in 1 and 2, nationals of other States engage in fishing in the same area, the measures adopted shall be applicable to them.

2. If the States whose nationals take part in the fisheries do not accept the measures so adopted and if no agreement can be reached within a reasonable period of time, any of the interested parties may initiate the procedure envisaged in article 7. Subject to paragraph 2 of article 8, the measures adopted shall remain obligatory pending the arbitral decision.

Article 4

1. A costal State having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts is entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there.

2. If the States concerned do not reach agreement within a

---

11. These articles are identical with articles 25 to 33 of the provisional articles concerning the regime of the high seas contained in chapter II of the present report. For comments on the articles see chapter II.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

reasonable period of time, any of the parties may initiate the procedure envisaged in article 7.

Article 5

1. A coastal State having a special interest in the maintenance of the productivity of the living resources in any area of the high seas contiguous to its coasts may adopt unilaterally whatever measures of conservation are appropriate in the area where this interest exists, provided that negotiations with the other States concerned have not led to an agreement within a reasonable period of time.

2. The measures which the coastal State adopts under the first paragraph of this article shall be valid as to other States only if the following requirements are fulfilled:

(a) That scientific evidence shows that there is an imperative and urgent need for measures of conservation;

(b) That the measures adopted are based on appropiate scientific findings;

(c) That such measures do not discriminate against foreign fishermen.

3. If these measures are not accepted by the other States concerned, any of the parties may initiate the procedure envisaged in article 7. Subject to paragraph 2 article 8, the measures adopted shall remain obligatory pending the arbitral decision.

Article 6

1. Any State which, even if its nationals are not engaged in fishing in an area of the high seas not contiguous to its coast, has special interest in the conservation of the living resources in that area, may request the State whose nationals are engaged in fishing there to take the necessary measures of conservation.

2. If no agreement is reached within a reasonable period, such State may initiate the procedure envisaged in article 7.

Article 7

1. The differences between States contemplated in articles 2, 3, 4, 5 and 6 shall, at the request of any of the parties, be settled by arbitration, unless the parties agree to seek a solution by another method of peaceful settlement.

2. The arbitration shall be entrusted to an arbitral commission, whose members shall be chosen by agreement between the parties.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Failing such an agreement within a period of three months from the date of the original request, the commission shall, at the request of any of the parties, be appointed by the Secretary-General of the United Nations in consultation with the Director-General of the Food and Agriculture Organization. In that case, the commission shall consist of four or six qualified experts in the matter of conservation of the living resources of the sea and one expert in international law, and any casual vacancies arising after the appointment shall equally be filled by the Secretary-General. The commission shall settle its own procedure and shall determine how the costs and expenses shall be devided between the parties.

3. The commission shall in all cases be consituted within five months from the date of the original request for settlement, and shall render its decision within a further period of three months unless it decides to extend that time-limit.

Article 8

1. The arbitral commission shall, in the case of measures unilaterally adopted by coastal States apply the criterial listed in paragraph 2 of article 5. In other cases it shall apply these criteria according to the circumstances of each case.

2. The commission may decide that pending its award the measures in dispute shall not be applied.

Article 9

The decisions of the commission shall be binding on the States concerned. If the decision ins accompainied by any recommendations, they shall receive the greatest possible consideration.

As may be seen, the changes made in the text of the original draft relate to certain scientific aspects. Sometimes they are new provisions, as in articles 1 and 6; in other cases, they are changes with regard to the organization of and procedure for arbitral authority to settle disputes between the States concerned the adoption or application of conservation measures.

Comments of governments and inter-American resolutions

The draft was submitted to governments and to the technical and scientific organizations represented at the Rome Conference for their comments and suggestions before the final text to be submitted to the General Assembly was drawn up. At its eighth session (1956), the Commission then reviewed its draft in the

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

light of the comments and suggestions it had received,[57] and amended somewhat the text approved at which statements were made on the subject: the Third Meeting of the Inter-American Council of Jurists (Mexico City, January 1956) and the Inter-American Specialized Conference (Ciudad Trujillo, March 1956). Before reviewing the Commission's draft, let us first see the position adopted by the American countries at those two meetings.

Resolution XIII of the Inter-American Council of Jurists, several times quoted already, contained a paragraph to the following effect:[58]

> "Coastal States have the right to adopt, in conformity with scientific and technical principles, measures of conservation and supervision necessary for the protection of the living resources of the sea in the proximity of their coasts, beyond territorial waters. Measures that are taken by a coastal State in such case shall not prejudice rights derived from international agreements to which it is a party, nor shall they discriminate against foreign fisherman."

According to the view expressed by the representative of the country that introduced the resolution on behalf of its co-sponsors, the paragraph quoted above "closely follows the text" which the delegations of Cuba and Mexico had submitted to the Rome Conference[59] and which, towards the close of the Conference, was supported, inter alias, by almost all the countries represented on the Inter-American Council of Jurists. However, as will be recalled, unilateral action in the draft to which he referred, was authorized only "when the States concerned have not agreed as to the measures for conservation..." because, among other reasons, "the nature and scope of the problems involved in the conservation of the living resources of the sea is such that there is a clear necessity that they should be solved primarily on a basis of international co-operation, through the concerted action of all Sates concerned." It will also be recalled that the Cuban and Mexican proposal contained a procedural clause whose purpose was to ensure that differences due to the adoption of unilateral measures should be settled by appropriate technical bodies of an international character.

---

57. See Doc. A/CN.4/99, Add.1-9 and A/CN.4/100

58. Cf. Final Act of the Third Meeting of the Inter-American Council of Jurists, Pan-American Union, Washington D.C., 1956, p. 34.

59. Cf. Inter-American Council of Jurists, Third Meeting, Records and Documents, Pan-American Union, Washington D.C., 1956, p. 313.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

The Inter-American Specialized Conference, which met some weeks after the Council of Jurists, did not pass judgement on the right of the coastal State to take conservation measures unilaterally. The resolution it adopted, also quite often quoted already, embodies the only conclusions the Conference could reach on the point, which were as follows:60

> "3. Co-operation among States is of the utmost desirability to achieve the optimum sustainable yield of the living resources of the high seas, bearing in mind the continued productivity of all species.
>
> 4. Co-operation in the conservation of the living resources of the high seas may be achieved most effectively through agreements among the States directly interested in such resources.
>
> 5. In any event, the coastal State has a special interest in continued productivity of the living resources of the high seas adjacent to its territorial sea.
>
> 6. Agreement does not exist among the States represented at this Conference either with respect to the nature and scope of the special interest of the coastal State or as to how the economic and social factors which such State or other interested States may invoke should be taken into account in evaluating the purposes of conservation programs."

In the course of its deliberations, the Conference considered the various proposals relating to the right of the coastal State to take conservation measures unilaterally but was unable to reach any agreement on the point . It accordingly confined itself to stating that the system of international co-operation, especially through agreements among the States directly interested, was the most effective way of achieving the aim of conservation. At the same time, although reporting the lack of agreement between the States represented at the Conference "with respect to the nature and scope of the special interest of the coastal State", it declared that "in any event, the coastal State has" such a "special interest". The interpretation to be placed on this last statement, which seems to be more in keeping with the informal discussions at the Conference and not in accord with the statements in paragraph 6 of the resolution, is that the coastal State always has, in principle, a special interest in the continued productivity of the living resources of the high seas adjacent ot its coast, but that the nature and scope of that interest may vary according to the case and circumstances. We shall return to this question

---

60. Cf. Final Act of the Inter-American Specialized Conference on "Conservation of natural resources: continental shelf and marine waters", Pan-American Union, Washington D.C., 1956, pp. 11 and 12.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

later, however, when we consider the corresponding article in the draft of the International Law Commission.

Text of the draft submitted to the General Assembly (1956)

The draft submitted by the Commission to the General Assembly was proceded by two general articles. The first, which was also at the head of the draft approved in 1955, relates to "the right to fish"; the purpose of the second is to define the meaning of "conservation of the living resources of the high seas" for the purposes of the draft. The preamble to the previous year's draft is reproduced by the Commission in the section of the commentary on these two articles, as part of the re-arrangement of all the articles relating to the regime of the sea which is made at its eightn session (1956). As the text is the same as that approved at the previous session, there is no need to add any comment to that made when explaining its contents in the previous section. To facilitate consideration of the two general articles just mentioned and of those following them, the full text of the draft is reproduced below: 61

SUB-SECTION B: FISHING

Right to fish

Article 49

All States have the right for their nationals to engage in fishing on the high seas, subject to their treaty obligations and to the provisions contained in the following articles concerning conservation of the living resources of the high seas.

Conservation of the living resources of the high seas

Article 50

As employed in the present articles, the expression "conservation of the living resources of the high seas" menas the aggregate on the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products.

Article 51

A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged shall adopt measures for regulating and controlling fishing activities in that area when necessary for the purpose of the conservation of the living resources of the high seas.

---

61. Cf. Report of the International Law Commission covering the work of its Eighth Session (Doc.A/3159), Chapter II.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Article 52

1. If the nationals of two or more States are engaged in fishing the same stock or stocks of fish or other marine resources in any area of the high seas, these States shall, at the request of any of them, enter into negotiations with a view to prescribing by agreement the necessary measures for the conservation of such resources.

2. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure contemplated by article 57.

Article 53

1. If, subsequent to the adoption of the measures referred to in articles 51 and 52, nationals of other States engage in fishing the same stock or stocks of fish or other marine resources in the same area, the conservation measures adopted shall be applicable to them.

2. If these other States do not accept the mesaures so adopted and if no agreement can be reached within a reasonable period of time, any of the interested parties may initiate the procedure envisaged in article 57. Subject to paragraph 2 article 58, the measures adopted shall remain obligatory pending the arbitral decision.

Article 54

1. A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea.

2. A coastal State is entitled to take part on an equal footing in any system of research and regulation in that area, even though its nationals do not carry on fishing there.

3. If the States concerned do not reach agreement within a reasonable period of time, any of the parties may initiate the procedure envisaged in article 57.

Article 55

1. Having regard to the provisions of paragraph 1 of article 54, any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other States concerned have not led to an agreement within a reasonable period of time.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

2. The measures which the coastal State adopts under the previous paragraph shall be valid as to other States only if the following requirements are fulfilled:

(a) That scientific evidence shows that there is an urgent need for measures of conservation;

(b) That the measures adopted are based on appropriate scientific findings;

(c) That such measures do not discriminate against foreign fishermen.

3. If these measures are not accepted by the other States concerned, any of the parties may initiate the procedure contemplated by article 57. Subject to paragraph 2 of article 58, the measures adopted shall remain obligatory pending the arbitral decision.

Article 56

1. Any State which, even if its nationals are not engaged in fishing in an area of the high seas not adjacent to its coast, has a special interest in the conservation of the living resources in that area, may request the State whose nationals are engaged in fishing there to take the necessary measures of conservation.

2. If no agreement is reached within a reasonable period, such State may initiate the procedure envisaged in article 57.

Article 57

1. Any disagreement arising between States under articles 52, 53, 54, 55 and 56 shall, at the request of any of the parties, be submitted for settlement to an arbitral commission of seven members, unless the parties agree to seek a solution by another method of peaceful settlement.

2. Except as provided in paragraph 3, two members of the arbitral commission shall be named by the State or States on the one side of the dispute, and two members shall be named by the State or States contending to the contrary, but only one of the members nominated by each side may be a national of a State on that side. The remaining three members, one of whom shall be designated as chairman, shall be named by agreement between the States in dispute. Failing agreement they shall, upon the request of any State party, be nominated by the Secretary-General of the United Nations after consultation with the President of the International Court of Justice and the Director-General of the Food and Agriculture Organization, from nationals of countries not parties to the dispute. If, within a period

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

of three months from the date of the request for arbitration, there shall be a failure by those on either side in the dispute to name any member, such member of members shall, upon the request of any party, be named, after such consultation, by the Secretary-General of the United Nations. Any vacancy arising after the appointment shall be filled in the same manner as provided for the initial selection.

3. If the parties to the dispute fall into more than two opposing groups, the arbitral commission shall, at the request of any of the parties, be appointed by the Secretary-General of the United Nations, after consultation with the President of the International Court of Justice and the Director-General of the Food and Agriculture Organization, from amongst well qualified persons specializing in legal, administrative or scientific questions relating to fisheries, depending upon the nature of the dispute to be settled. Any vacancy arising after the appointment shall be filled in the same manner as provided for the initial selection.

4. Except as herein provided the arbitral commission shall determine its own procedure. It shall also determine how the costs and expenses shall be divided between the parties.

5. The arbitral commission shall in all cases be constituted within three months from the date of the original request and shall render its decision within a further period of five months unless it decides, in case of necessity, to extend that time limit.

Article 58

1. The arbitral commission shall, in the case of measures unilaterally adopted by coastal States, apply the criteria listed in paragraph 2 of article 55. In other cases it shall apply these criteria according to the circumstances of each case.

2. The arbitral commission may decide that pending its award the measures in dispute shall not be applied.

Article 59

The decisions of the arbitral commission shall be binding on the States concerned. If the decision is accompanied by any recommendations, they shall receive the greatest possible consideration.

The freedom to fish under contemporary international law

In connexion with article 49 it is to be noted that an earlier

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

provision on the general regime of the high seas stipulates that "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty" (article 27). The same article, listing the four main freedoms of the sea, refers explicitly to "freedom of fishing". In the definition given in article 49 of the right to the free use and exploitation of the living resources of the high seas, the two fundamental ideas which it seeks to express clearly emerge. On the one hand it proclaims the freedom of fishing in any zone of the high seas as a consequence of the principle governing the juridical regime of that area of sea, but at the same time subjects the exercise of that freedom to the possibility of regulation. The first case mentioned is, strictly speaking, a reaffirmation of the traditional principle of the freedom of the seas, in as far as the treaties regulating fishing are binding only on the contracting States. The second, on the other hand, presents an entirely different situation, when one considers the nature and scope of some of the provisions on conservation of the living resources of the high seas to which article 49 refers. For the moment we merely wish to bring out the fact that the Commission admitted the possibility of fishing on the high seas bein regulated otherwise than through agreements between the States concerned, thereby explicitly abandoning the concept of the absolute freedom of fishing prevailing in traditional international law.[62] How far the Commission went in that direction and the way in which it safeguarded the interests protected by that principle will be seen later.

Meaning of the phrase "conservation of the living resources of the high seas"

Article 50 defines the purpose of the set of rules on the subject drawn up by the Commission in accordance with the concept formulated by the Rome Conference regarding the "principal objective" of conservation. In the commentary on the article note is taken of an observation by the International Commission for the North West Atlantic Fisheries that "the time is past when the sole concern is conservation of stocks and that an attempt is now being made to develop useful stocks to beyond their present strength". As added in the commentary, the purport of the definition given in article 50 is further clarified by the connotation attached by the Rome Conference to the "immediate aim of conservation", i.e. "to conduct fishing activities so as to increase, or at least to maintain, the average sustainable yield of products in desirable form".[63] The Commission for the North West Atlantic Fisheries did not propose the use of any other term but confined itself to suggesting the possibility of adding an explanation

---

62. See commentary on articles 27 and 49 of the draft.

63. Ibid., commentary on article 50. See also the Report of the Rome Conference referred to in footnote 22, paragraph 17 and 18.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

that the term "conservation" did not exclude any regulations "aiming at further development of stocks".64 The commentary of the International law Commission seems to imply that the definition given in article 50 and based on the concepts formulated by the Rome Conference is broad enough to cover the two objetives of conservation.

Conservation as a right and as a duty of States

Articles 51 contains the first provision designed to protect the general interest in conserving the living resources of the sea. In the 1953 draft, as in that prepared by the Commission in 1955, this article enunciated the "right" of any State whose nationals are engaged in fishing in any area in the high seas where the nationals of other States are not thus engaged to regulate or control fishing activities in that area for the purpose of conservation. When the Commission reconsidered this at its eighth session, some members pointed out that, strictly speaking,rather more than a right was involved, since conservation, when really necessary, also implied obligations on the State or States whose nationals were engaged in fishing in areas of the high seas. Furthermore, the 1955 draft already contained a provision according to which, as we shall see later, any State which had a special interest in the conservation of the living resources of an area could ask the States whose nationals were engaged in fishing in that area to take the "necessary" conservation measures. The new text of the article is baded on these considerations. On a somewhat different tack, in the case of an area of the high seas adjacent to the territorial sea of the State, the existence of regulations issued by a third States does not, as the Commission points out in its commentary, prevent the coastal State from invoking article 54, or from adopting conservation measures in accordance with the provisions of article 55 and on the conditions laid down in those articles.65

Obligation to adopt collective measures

Article 52 is substantially the same as that approved by the Commission at its seventh session, being based on another of the provisions of the 1951 draft. The new text however introduced one change which should be pointed out. Whereas the previous text referred to fishing "in an area of the high seas", the latest text of the article refers to "fishing the same stock or stocks of fish or other marine resources in any area of the high seas".

---

64. Cf. Doc. A/CN.a/100, p.4

65. Cf. Report of the Commission, commentary on article 51. See also Summary Record of the 350th and 355th meetings (Docs. A/CN.4/SR.350 and 355, respectively).

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

that the term "conservation" did not exclude any regulations "aiming at further development of stocks".64 The commentary of the International law Commission seems to imply that the definition given in article 50 and based on the concepts formulated by the Rome Conference is broad enough to cover the two objetives of conservation.

Conservation as a right and as a duty of States

Articles 51 contains the first provision designed to protect the general interest in conserving the living resources of the sea. In the 1953 draft, as in that prepared by the Commission in 1955, this article enunciated the "right" of any State whose nationals are engaged in fishing in any area in the high seas where the nationals of other States are not thus engaged to regulate or control fishing activities in that area for the purpose of conservation. When the Commission reconsidered this at its eighth session, some members pointed out that, strictly speaking, rather more than a right was involved, since conservation, when really necessary, also implied obligations on the State or States whose nationals were engaged in fishing in areas of the high seas. Furthermore, the 1955 draft already contained a provision according to which, as we shall see later, any State which had a special interest in the conservation of the living resources of an area could ask the States whose nationals were engaged in fishing in that area to take the "necessary" conservation measures. The new text of the article is baded on these considerations. On a somewhat different tack, in the case of an area of the high seas adjacent to the territorial sea of the State, the existence of regulations issued by a third States does not, as the Commission points out in its commentary, prevent the coastal State from invoking article 54, or from adopting conservation measures in accordance with the provisions of article 55 and on the conditions laid down in those articles.65

Obligation to adopt collective measures

Article 52 is substantially the same as that approved by the Commission at its seventh session, being based on another of the provisions of the 1951 draft. The new text however introduced one change which should be pointed out. Whereas the previous text referred to fishing "in an area of the high seas", the latest text of the article refers to "fishing the same stock or stocks of fish or other marine resources in any area of the high seas".

---

64. Cf. Doc. A/CN.a/100, p.4

65. Cf. Report of the Commission, commentary on article 51. See also Summary Record of the 350th and 355th meetings (Docs. A/CN.4/SR.350 and 355, respectively).

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

This change was made in response to one of the comments received from governments, which us itself based on the Report of the Rome Conference.[66] In making it the Commission had specially in mind the case where nationals of different States exploit the same stock of fish. In general, in its opinion, a State should not be entitled to invoke the Article and request the opening of negotiations to initiate the arbitral procedure, when other States, though fishing in the same area, are exploiting another stock of fish. It may, however, happen that the conservation measures which one of the States to take are thearted by fishing methods applied by the nationals of the other States, even though they are exploiting another stock of fish. In that case, the Commission adds in its comentary, the right to ask for the opening of negotiations as provided in the article cannot be denied. The commentary also explains that for the article to be invoked, it will not be sufficient for the nationals of the States to engage occasionally in fishing an area where the nationals of other States also fish, because the article only covers the case where the nationals of two or more States are regularly engaged in fishing in the same area. Should the nationals of a State only fish there casually, that State cannot invoke article 52, though it can invoke article 56 if it has a special interest in conserving the resources of the area in question.[67]

Applicability of the measures adopted by third States

In the case of article 53, too, no substantial change was made the eighth session to the text approved in 1955. However, in the system of the Commission's original draft (1953) and in that of the proposal we submitted at the seventh session, the situation envisaged in the article related solely to the applicability of collective measures and, even in that case, the nationals of other States wishing to engage in fishing in the areas in which the measures apply, would not be obliged to comply with them as long as they not been declared applicable to those newly taking part in the fishing by the competent international authority provided for in each of the drafts. The situation now is rather different. Not only collective measures (article 52) will apply to newcomers but also those which the State may adopt unilaterally to regulate fishing by its own nationals (article 51). Thus the Commission placed the latter State in a situation potentially similar to that of the coastal State acting in accordance with the provisions of article 55, despite the fact that article 51 deals with the case

---

66. See the comments of the United States Government in Doc. A/CN.4/99, p.10 et seq., and Report of the Rome Conference referred to in footnote 22, paragraph 55.

67. Cf. Report of the Commission, Commentary on Article 52.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

of a State which may or may not be coastal. When it is not a coastal State however, is there any justification for the analogy in favour of States which cannot claim the special interest which only the coastal State is acknowledged to have for such purposes? Similarly it does not appear to be fully justifiable for the collective measures envisaged in article 52 to be applied automatically to nationals States which had no say in their adoption or which refuse to accept them once they have been adopted. If the States in question are not coastal States which have acted in accordance with the relevant provisions of the draft, we cannot see how validity erga omnes can be attributed tho the measures adopted by two or more States.

In its commentary on the article under consideration, the Commission says no more on this point than that "it seems to be indicated that newcomers should comply with the regulations in force in the waters where they wish to engage in fishing", adding that "if the States of which the newcomers are nationals are not prepared to apply the regulations as they stand, they can open negotiations for their amendment with the States concerned. Failing agreement, the procedure laid down in article 57 will have to be followed." Despite all this, it seems more in accordance with the principle of the freedom of fishing in the high seas to make the validity and entry into force of the measures in question with respect to newcomers subject to the arbitral decision referred to in the article. For there can be no doubt, as the Rome Conference pointed out, that "failure of all States concerned to participate in the preparation, negotiation and establishment of international fishery conservation impeds or limits progress in achieving the objectives of conservation". But this consideration, as the Conference also admitted, refers rather to States "engaged in substantial exploitation of the stock".68 The question having been raised again at its eighth session, the Commission agreed to add to the Comentary on article 53 an explanation to the effect that "the regulations should be applicable to newcomers only if they engage in fishing on a scale which would substantially effect the stock in question. Any dispute regarding the applicability of the regulations shall be submitted for decision in accordance with article 57."69

---

68. See p.... above

69. Cf. Report of the Commission, paragraph (1) (2) of the commentary. In connexion with this article, the Commission considered a proposal based on the "principle of abstention" to which we referred when studying the "zones of exclusive exploitation". The Commission's commentary and decision on this proposal, as on that for the establishment of an "exclusive fishing zone" are given on p. 35 of the Report. On this point see also section 10 of Chapter II.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Nature and scope of the "special interest" of the coastal State

Let us now look at the provisions dealing with the rights which the draft accords the coastal State on the strength of its special interest in the conservation of the living resources of the high seas contiguous to its territorial sea. It is these provisions, to be found in articles 54 and 55 of the text under consideration, which reveal the radical change that took place in the position of the Commission after the Rome Conference. The first innovation to be observed in the drafts approved in 1955 and 1956 relates to the actual concept of the "special interest" of the coastal State. As will be recalled, the provision in the original draft (1953), corresponding to the present article 54 made recognition of the right of the coastal State in the case covered by the article subject to the purely mathematical criterion of a distance of 100 miles. At the seventh session (1955) this limit was abandoned and a more rational and objective formula adopted in line with the concepts enunciated by the Rome Conference. Thus, instaed of recognizing the rights of the coastal State described in articles 54 and 55 in an area of predetermined breadth, the Commission recognized both rights on the strength of that State's "special interest in the maintanance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea". As it pointed out in its 1955 report, "the Commission did not deem it advisable to adopt a fixed limit, which might prove in practice to be either too wide, or in particular cases, too narrow".70

At its eighth session, the Commission introduced certain formal changes, as may be seen by comparing the text of the two drafts which we have reproduced. One consisted in defining the special interest of the coastal State only in the first of the two articles under consideration, thereby avoiding unnecessary repetition of the concept. The other lay in using the phrase, "a coastal State has a special interest...", instead of, "a coastal State having a special interest...", used in the 1955 draft. This second change is in deference to the view expressed by some members of the Commission that the State, by the mere fact of being a coastal State, possessed such a special interest. As the Commission observes in its report, this idea was already expressed in the preamble to the articles approved at the previous session, but the majority was agreed to incorporate it in the actual text of the draft. The same commentary adds that the 'special' character of the interest of the coastal State should be interpreted in the sense that the interest exists by reason of the sole fact of the geographical situation. However, the Commission does not wish to imply that the 'special interest' of the coastal State should take precedence per se over the interests of the other

---

70. Cf. 1955 Report (Doc.A/2934), p.11

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

States concerned.71 As may be seen, the situation is the same as that explained with reference to the Resolution of the Specialized Conference of Ciudad Trujillo: the coastal State, in principle, always has a special interest in maintaining the productivity of the resources of the high seas near to its coast, but the nature and scope of that interest may vary according to the case and circumstances. That seems to be the most reasonable and fair criterion, bearing in mind that the special interest which the coastal State is acknowledged to have does not to need be exclusive and overriding in order to merit and obtain suitable and effective legal protection.

The right to unilateral action; circumstances and conditions of its exercise

Otherwise article 54 differs in no element from the 1953 draft, except of course in the procedural clause contained in paragraph 3 which, like that in the other articles, will be considered later. The same is not true of article 55, however, which reproduces the form and substance of the ideas enunciated in articles 4 and 5 of the proposal which we submitted to the Committee at its seventh session (1955). It is not difficult to see why recognition of the right to adopt in areas of the high seas unilateral conservation measures which would be valid as to other States, constitutes the key point of the whole discussion of the draft. This was undoubtedly the fundamental element in the new system we were going to propose for the conservation of the resources of the sea. In this connexion, the Commission was mainly concerned with three consideration. First, the recognition of the unilateral action of the coastal State appeared to be the sole possible means of remedying the loopholes and inadequacies of the traditional system of international co-operation. It was an objective and practical device amply ssuported by the experience of more than half a century of effort to achieve effective collective regulation. Quite apart from this consideration, the recognition of this power of the coastal State was justified if protection of the special interest of that State in maintaining the productivity of the resources of the high seas near to its coast was to be ensured. This second consideration, in turn, was based on the conclusions of the Rome Conference on that point. Only, one problem in some ways the most important of all, still remained to be solved, namely the threat to the freedom of fishing in the high seas which permission to certain States to regulate it unilateral might entail.

But even on this last point the difficulties were not insuperable. In the first place, the right was not going to be recognized

---

71. Cf. 1956 Report, paragraph (14) of the introduction to articles 50-59. See also Summary Record of the 31st meeting (Doc.A/CN.4/SR.351).

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

just as it was. Its recognition would depend on the existance of certain circumstances and its exercise would be subject to a combination of specific conditions. It should be sufficient to establish what those circumsntances and conditions were, as is done in the first two paragraphs of the existing article 55 and, were there still reason to fear that the conservation measures the coastal State might adopt in the exercise of this right would not meet the requirements essential for its validity, an additional safeguard could still be devised. This new safeguard was arbitration or, rather, the obligation of the coastal State to submit this mode of settlement any measures to which the other States concerned objected. This safeguard was also included in the last paragraph of the article. In view of all these considerations, the Commission considered not only that recognition of this special right of the coastal State was essential to the new juridical regime that it was evolving but that it did not deprive the other States of the necessary safeguards for their interests and rights in the exploitation and conservation of the living resources of the high seas.[72]

In its 1956 report, the Commission explains when the coastal State is entitled to take unilateral action and when it may exercise the right recognized in article 54. The criterion for distinguishing between these two situations is the degree of need to take conservation measures. If there is an urgent need, the coastal State may act in accordance with the provisions of article 55. If, on the other hand, the need for conservation is not urgent, unilateral action will be uncalled for and the coastal State can only exercise the right accorded it by article 54, namely, to take part on an equal footing in any system of research and regulation established for conservation purposes in the areas adjacent to its territorial sea. At its eighth session, the Commission also envisaged the case, fairly often met with in practice, of areas of the high seas adjacent to more than one coastal State. To solve difficulties arising in such cases, the Commission states in its commentary that prior agreement between the various States will be required.[73] This solution is the logical one and, all events, the only one that seems possible in such a case. Where there is both diversity and simultaneity of special interests, none of the coastal States can claim exclusively for itself the right conferred on all under article 55.

Case of a non-coastal with a special interest in conservation

The last substantive provision of the draft article 56, deals

72. Cf. 1955 Report (Doc.A/2934), p.12. See also paragraphs (11) and (12) of the introduction to articles 50-59.

73. Cf. 1956 report, paragraphs (2) and (3) of the commentary on article 55.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

with a situation not envisaged in any of the drafts prior to 1955, namely the case of States which, though its nationals are not engaged in fishing "in an area of the high seas not adjacent to its coast", has a special interest in the conservation of the resources of that area. According to the Commission's commentary "this case may arise, for instance, if the exhaustion of the resources of the sea in the area would affect the results of fishing in another area where the nationals of the State concerned do engage in fishing". Yet another case was thought of during the discussion of this article, namely, that of a State which, likewise not a coastal State, has a special interest in maintaining the productivity of particular resources not exploited by its nationals but whose exploitation is an important factor for its economy or for the feeding of its population. The draft accords this new category of interested the right to request those States whose nationals do exploit the resources to take the necessary conservation measures and also provides a procedure for making its request effective. As the "special interest" of this State cannot be put on the same footing as that of the coastal State, the draft naturally does not confer the same rights on both categories of State.74

The system of compulsory arbitration in the draft

The remaining provisions of the draft deal with the settlement of disagreements between States in connexion with the adoption or application of conservation measures. The first (article 57, paragraph 1) stipulates that any disagreements under article 52, 53, 54, 55 and 56 shall, at the request of any of the parties, be settled by an arbitral commission of seven members, unless the parties agree to seek a solution by another method of settlement. Accordingly the draft, though authorizing the Parties to settle their differences by any other mutually acceptable method or procedure of settlement, provides for compulsory arbitration in the event of their being able to agree on that point. At its eighth session, some members of the Commission opposed the system of the draft, proposing that all the procedural clauses be omitted or at least that a general obligation be established to seek peaceful settlement in the manner provided for in Article 33 of the Charter of the United Nations. The Commission decided, however, to keep the system, considering that "in proposing for States rights over the high seas going beyond existing international law, the Commission could not rely on the due functioning of the general rules for the peaceful settlement of disputes, but would have to create

74. Ibid., paragraph (1) of the commentary on the Article.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

effective safeguards for the settlement of disputes by an impartial authority".75

The method of settlement established by article 57 is, furthermore, not one compulsory arbitration pure and simple. If one of the Parties fails to make the appropriate nominations for constituting the arbitral commission within a period of three months from the date of the request for arbitration, the article provides for a procedure to enable all or part of that commission to be constituted without the co-operation of the parties. Thus, the draft has adopted the arbitration system which was first introduced by the General Act for the Pacific of International Disputes, signed at Geneva in 1928, and which was later incorporated in the American Treaty on Pacific Settlement (Pact of Bogota) and numerous recent bilateral agreements. According to this system, the constitution, working and award of the arbitral body do not depend on the agreement of the parties, as in the traditional system. In reality, as the practice of this institution has amply shown, this is the best way of ensuring the efficacy of the obligation to resort to arbitration. That does not, of course, mean that the system should be applied in all cases with equal rigidity. International disputes being supremely varied in nature, it would not be logical or practical to subject them all to the same procedure. The procedure proposed by the Commission for sttling the disputes envisaged in the draft is fully justified in view of the fact that the disputes involved are in connexion with the resources of the sea whose conservation comes under the exclusive competence of no particular State.

Article 57 contemplates two different situations in connection with the constitution of the arbitral commission: (a) that of a dispute between two States or a dispute between several States divided into two opposing groups, each group being homogeneous as regards the interests to be safeguarded; and (b) the case of several parties to the dispute divided into more than two groups, each with different interests. As the Commission points out in its report, the first case will be the more frequent. If, on either side, there are several States parties to the dispute, they may join together and act as one party in regard to the appointment of arbitratorts. In that case, there is no need to depart from the usual methods in forming the arbitral commission. Each State, or each group of States, will appoint two arbitrators, only one of whom may be a national of the State or one of the States appointing

---

75. Ibid., paragraphs (17) and (18) of the introduction to articles 50-59. See also the discussion on the subject in the Summary Records of the 352nd and 353 rd Meetings (Docs.A/CN.4?SR.352 and 353, respectively).

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

it. Failing agreement between the parties, the other three members of the commission will be appointed by the Secretary-General of the United Nations, after consultation with the President of the International Court of Justice and the Director-General of the United Nations Food and Agriculture Organization, from nationals of States not parties to the dispute. In the second case the above method cannot be applied and recourse must be had to an impartial authority which will apoint the whole arbitral commission. In this case too the most appropriate authority seems to be the Secretary-General of the United Nations, acting after consultation with the two authorities previously mentioned. In view of the diversity of the interests involved, the number of arbitrators will have to be fairly large. Hence the International Law Commission provides for an arbitral commission of seven members to be appointed from amongst properly qualified persons, experts in legal, administrative or scientific matters appertaining to fisheries, depending upon the nature of the dispute.[76] Such were the considerations underlying the changes made at the eight session in the corresponding article approved by the Commission in 1955.

Criteria to be applied in settling various disputes

Article 58 covers two distinct questions which must be considered separately. The first is merely that of the criteria to be applied by the arbitral commission in settling the various disputes referred to it. When the dispute involves unilateral mesaures adopted by the coastal State, the commission will apply the criteria listed in article 55, paragraph 2. This follows logically from that provision of the draft, since such measures will be valid as to other States only if they are in accordance with those criteria. However, in view of the different types of disputes envisaged in the other articles of the draft, those criteria cannot of course wholly apply in every other case. Accordingly, the arbitral commission will have to be left some discretion as to the way of applying them in the light of the peculiar circumstances of each case. In its 1956 report, the Commission found it advisable to formulate certain guiding principles in that connection which indicate the reasons why the criteria enunciated in article 55 cannot be applied in the same manner.

In all cases it is for the arbitral commisssion to determine: (a) whether scientific findings demostrate the necessity of conservation measures to make possible the optimum sustainable productivity of the stock or stocks of fish; (b) whether the measures do not discriminate against foreign fishermen. In the case of article 52, 53, 54 and 55, the arbitral commission has to determine: whether the specific measures are based on scientific findings and appropriate for the purpose. In determining appropriateness, the elements of effectiveness and practicability are to be considered as well as the relation between the expected benefits, in terms

76. Ibid., commentary on Article 57.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

of maintained and increased productivity, and the cost of application and enforcement of the proposed measures. In the case of article 56, the criteria of the previous paragraph will be slightly different, as the State requesting the fishing State to take necessary measures of conservation would be a non adjacent and non fishing State. Such a State would be concerned only with the continued productivity of the resources. Therefore, the matter to be determined would be not whether the measures are appropriate for the purpose but the adequacy of the overall conservation programme.77 Thus paragraph 1 of article 58 is not to be regarded as designed to subject the conservation measures unilaterally adopted by a coastal State to a special and stricter regime. Indeed the intention behind the article is precisely to subject those measures adopted by agreement among States to similar conditions and requirements, in view of the fact that the end pursued in all cases is fundamentally the same.

Suspension of the measures in dispute

In its second paragraph, article 58 specifies that the arbitral commission may decide that pending its award the measures in dispute shall not be applied. According to article 53, the measures adopted by a State to regulate fishing by its nationals (article 51) and those adopted by two or more States (article 52) shall be applicable to nationals of third States who wish to engage fishing in the same area. In the same way, the measures adopted unilaterally by a coastal State shall remain in force until the arbitral decision in announced. The first case has already been referred to, Let us now consider the second provision which in the period between the Commission's two sessions was criticized by certain governments. The Commission nevertheless considered the continuation in force of such unilateral measures to be "essential". "If objections by another State to the unilateral regulations of the coastal State sufficed to suspend their application, the whole purpose of the article (55), which is to give the coastal State right to take measures in case of urgent need, would be frustrated." To digress somewhat this article is not merely designed to take the special interest of the coastal State, it also safeguards the general interest of the international community by making it possible to adopt conservation measures immediatly in case of urgent need. In the Commission's opinion, "the power given to the arbitral commission under article 58, paragraph 2, to suspend application pending its award seems an adequate safeguard against abuse."78 This power is base on the procedural principle that courts and certain administrative bodies may hold up the application of a measure in dispute until the question of its validity

77. Ibid., commentary on Article 58.

78. Ibid., paragraph (4) of the commentary on Article 55.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

is decided. In the case with which we are concerned, since the unilateral measures can only be adopted in situations where "scientific evidence shows that there is an urgent need" for them, it would be unreasonable to assume that the arbitral commission would make arbitrary use of this power, either to suspend application of the measures if their adoption has been justified, or to allow them to continue in force if there was no really must urgent need for them to be adopted, or if the coastal State did not act in accordance with the other requirements of article 55.

Nature and scope of the decisions of the arbitral commission

The last article of this draft, like that in the draft of the previous year, deals with the nature and scope of the decisions that the arbitral commission may take. At its eighth session (1956), the Commission went more thoroughly into this point. As was clearly brought out during the discussion, article 59, in the first place, establishes that the arbitral commission's decisions shall be binding only upon the parties to a dispute; they will have no effect erga omnes. Secondly, the arbitral commission may, in addition to giving a ruling on the points in dispute, issue recommendations to the parties on the conservation measures in considers appropriate. Such recommendations will not, however, be binding on the parties unless they have requested the commission to make them, but they will merit the closest attention.79 The value of this last provision of article 59 must not be underestimated. Although the recommendations that the arbitral commission may make to the parties are not strictly binding upon them, they are bound to be of the greatest use to the parties, and to all States when conservation measures have to be taken, unilaterally or collectively, in fishing areas or with regard to stocks of fish, provided that the recommendations are applicable.

Idea and basic purpose of the International Law Commission's draft

A more detailed account of the draft prepared by the International Law Commission at its seventh and eighth sessions hardly seems necessary. The account already given, combined with that in the previous section, provides sufficient material for a proper appreciation of the more outstanding features of the system which the draft establishes for the conservation of the living resources of the sea. We would however like to emphasis one element which seems of primary importance. It is plain to see that the fundamental idea of the draft is the diversity of

79. Ibid., commentary on Article 59. See also Summary Record of the 355th. Meeting (Doc. A/CN.4/SR.355)

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

legitimate interests at the present day which merit recognition by international law; and that its sole purpose is to ensure adequate and effective legal protection of all those interests. As will emerge from the next chatper, this idea and this purpose dominate the legal regime of the sea in the present state of its development.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

CHAPTER V

CONCLUSION: THE NEW INTERNATIONAL LAW OF THE SEA

The foregoing study has brought out the profound transformation that the international law of the sea has undergone as a result of technical progress and its economic and social repercussions. This transformation has, of necessity, detracted from the absolute character of the fundamental concepts and principles of the regime of the high seas. What we are faced with here is not merely the emergence of new rules of law within the framework of the old system; it is rather the fact that the traditional concepts and principles are undergoing a substantial evolution. By way of conclusion, let us recapitulate the problems now raised by the use and conservation of the resources of the sea and the solutions available in the present state of international law.

26. THE NEW CONCEPT OF THE "SPECIAL INTEREST" OF THE COASTAL STATE

The special interest of the coastal State under traditional international law

Strictly speaking, traditional international law did not recognize any interest of the coastal State distinct from that possessed by the other States in the use and conservation of the wealth of the sea. Although the coastal State could exercise exclusive rights for both purposes in its territorial waters, on their bed and in their subsoil, the recognition of such rights was not specifically designed to ensure special protection for the interest that the said State might have in the wealth in the immediate neighbourhood of its coasts. This maritime extension of sovereignty. But, apart from these rights, it was not admitted that the coastal State could have a "special interest" in the use and conservation of the resources to be found in areas of the high seas contiguous to its territorial sea, nor, accordingly, that it must be acknowledged to have greater rights than the other States whose nationals exploited those resources. Thus, international law recognized only one category of "interested State". viz., that whose nationals were engated in exploiting the marine wealth. And it recognized only one right enjoyed equally by all, namely, freely to exploit that wealth, subject to the limitations that each imposed on its nationals or that the States agreed upon among themselves.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

The new concepts of the "special interest" and its two main forms of expression in contemporary law

The situation in present day international law has changed considerably, and in some respects radically; for instance, with to the natural resources of the sea bed and subsoil of the continental and insular shelves and other submarine areas. The fact of there being "a geographical continuity and physical unity between the insular and continental territory of each State and its respective submarine shelf, which forms a geographic unit with the adjoining land", as the Caracas Conference put it, together with other considerations of an economic kind, has led to the recognition of the exclusive right of the coastal State to use and benefit from those resources. This, as will be seen, is a radical change. Not only has an extension of the coastal State's competence been admitted beyond the bounds of the territorial sea but, what is more, the rights accorded it exclude the other States from the use of and benefit from the wealth to be found or discovered in the sea-bed and subsoil of the submarine areas adjacent to its territory.

This has opened the way for a tendency to recognize other special rights, though of different nature and scope, but also in areas of the high seas, for the purpose of conservation of other maritime resources. Recognition of these rights is based on a similar consideration: the "special interest" of the coastal State in maintaining the productivity of the living resources of the high seas near to its coasts. This concept, which represents the great contribution of the Rome Conference to the definition of the special interests of the coastal State, has not only provided a basis for the rights that States is acknowledged to have but has also enabled their content and scope to be defined. But the point to be made at the moment is not the specialized and limited nature of this other extension of State competence but the fact that the existence has been admitted of a distinct category within the traditional concept of the "interested State", namely, that of coastal States with a "special interest" in maintaining the productivity of the living resources to be found beyond the bounds of their territorial seas.

Other forms of expression of this concept

These, then, are the two main forms of expression of the new concept of the "special interest" of the coastal State. But the rights to which we have referred are not the only ones that this State enjoys or may enjoy in the new legal system in order to protect its interest in the use and conservation of the resources of the sea near to its coast. As will be recalled, when the configuration of its territory permits, the coastal State is not

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

bound to follow its coastline when tracing the baseline of its territorial sea and may declare the stretches of sea between its coast and the straight baselines to be "internal waters". The consequences of this system are obvious as far as the right to use the resources to be found in those waters in concerned. And the position is the same if, in certain circumstances, the State is acknowledged to have the right to the exclusive exploitation of the living resources in certain areas of sea, or of certain particular species, outside its internal and territorial waters.

27. THE PROTECTION OF THE "GENERAL INTEREST" UNDER THE NEW LEGAL ORDER

The "general interest" also an essential object of legal protection

Now neither the recognition of the special interests of the coastal State nor the forms of legal protection which are coming to be accepted has substantially affected the interest of the international community in the use and conservation of the wealth of the sea. On the contrary, protection of the "general interest" is an equally fundamental purpose of the new legal order which is coming into being. The extensions of competence of the coastal State which are now coming to be recognized have not deprived the other States of the various rights of use and exploitation they possess under the principle of the freedom of the seas. As will have been observed, concurrently with the recognition of these extensions of competence, the necessary safeguards have been provided for the free use of and benefit from the sea both as a source of wealth and as an international highway.

Safeguards for the general interest in the system applying to the submarine areas

This statement is true even with regard to the right reserved by the coastal State to explore and exploit the natural resources of the submarine areas adjacent to its territory. Undoubtedly, this exclusion of the other States is, strictly speaking, more apparent than real, since international law already admitted the validity of the national claims which had been made with respect to certain resources beyond the bounds of the territorial sea. The only difference really is that occupation is no longer a condition *sine qua non* of this right. For the rest, recognition of the coastal State's exclusive right to the use and exploitation of these resources has not affected the regime of the high seas applicable to the waters over the submarine area in question. Though the exploration or exploitation of these areas may at some time involve some interference with navigation or fishing, it can in no case abolish these two freedoms of the sea or submit their

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

exercise to any restriction whatsoever.

Safeguards for the general interest in the system for the conservation of the living resources of the high seas

Nor is the "general interest" affected in its essentials if the coastal State is accorded special rights for the conservation of the living resources in areas of the high seas contiguous to its territorial sea. For the right to take unilateral conservation measures is not necessarily incompatible with the freedom of the other States concerned to use those resources nor with the right that those States also possess with regard to the adoption and application of such measures. Unilateral action by the coastal State would not be in order unless it had initiated negotiations with the other States unless agreement had not been reached within a reasonable period of time. Even if those conditions were fulfilled, the unilateral measures would not be valid as to those States unless they fulfilled certain other requirements. Finally, should disputes arise between those States and the coastal State over the measures adopted or applied by the latter, there would still remain the resort to compulsory arbitration in accordance with the procedure we have already considered. This all goes to show that under the new system for the conservation of the living resources of the sea, the "general interest" would enjoy all the necessary safeguards to protect it against any arbitrary, unjustified or unsuitable measures that the coastal State might adopt.

28. THE PROBLEM OF THE BREADTH OF THE TERRITORIAL SEA

Point of departure for considering and settling this problem

As pointed out when studying the problem now arising in connexion with the breadth of the territorial sea, any argument or opinion that might be put forward on the subject would be completely devoid of foundation if it did not take account of all the interests and competences which the coastal State is now being recognized as having or that it has proclaimed for the exploitation or conservation of the resources of the sea beyond the bounds of its territorial waters. Furthermore, nobody can fail to realize that the lack of uniformity evident in present practice and the reluctance to admit the validity of extensions beyond the traditionally accepted limits are mainly due to the conflict of interests which has arisen in connexion with the right to use and conserve the resources to be found in the areas affected by those extensions. The interest in navigation, and security or other considerations also weigh in favour or against, as the case may be, a greater breadth for the territorial sea, but undoubtedly to a much less degree. It will accordingly much facilitate the solution of this problem of the breadth of the territorial sea if it is considered in the light of all the new interests and rights of the coastal State and of those interests and rights which other States have in the use of and benefit from the sea.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

In this connexion, the point of departure must logically be as follows. When the tendency to broaden the territorial sea first emerged and developed international law accorde the coastal State no right in the high seas other than that of claiming by occupation certain natural resources of the submarine areas adjacent to its territory. In the "contiguous zone" its competence was limited to the right to take steps to prevent or puhish infringements of certain local laws. It was not accorded the right, with the nature and scope not attributed to it, of exclusive exploitation of all the resources of the sea-bed and subsoil of the continental and insular shelves or of other submarine areas as far as the depth of the superjacent waters permits of their explitation, nor was its right recognized to take unilateral measures to conserve the living resources in areas of the high seas contiguous to its territorial sea. Accordingly, if the greater breadth which it is sought to give to the territorial sea is simply for one of the other of the above purposes, recognition of these new rights would enable the coastal State to achieve its ends without any need to broaden its territorial sea. As far as conservation is concerned, the right accorded the coastal State is admittedly not of the same nature as that it is acknowledged to have in the case of a "contiguous zone" in the proper sense of the term, but, as we have already seen when there is an urgent need to take measures for the purpose of conservation the situation is practically the same.

Recognition of these two new rights solves the problem of course, only in the two cases to which we have just referred: there still remains a third case in which the coastal State has a distinct purpose in extending its territorial sea. We have in mind that in which its object is to acquire an exclusive right of use and exploitation in respect of the living resources to be found outside the traditional limits of the territorial sea. In point of fact this is the only case in which solution of the problem continues to present serious difficulty, with the aggravating circumstance that it is possibly the case which arises most frequently in practice. Even here, however, the difficulties are not insuperable. The breadth to be assigned to the territorial sea is not a question coming under the internal and sole jurisdiction of the coastal State. As the International Court of Justice declared in the Anglo-Norwegian Fisheries case, "Although it is true that the act of delimitation is necessarily a unilateral act because only the coastal State is competent to take it, the validity of the delimitation with regard to other States depends upon international law." It is this premiss, to which no one could seriously object, which provides not only the point of departure for judging the problem in the situation to which we refer but also the very key to its solution.

Situations settled by international practice

International law, in fact, recognizes the legitimacy of certain titles and of special circumstances which the coastal State has invoked as a justification for extending its territorial sea and

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

for that extension to be valid with respect to third States. "Historic rights" constitute an indisputable title, as the case of the Scandanavian countries shows. The fact that all the States in the same region have fixed a common limit, with the apparent acquiescence of others, as has happened in the case of the coastal States of the Mediterranean, also appears to be a circumstance or a title that such States can invoke vis-a-vis other States. But there are two other situations concerning which there too, can be no doubt. One is that of States which have undertaken by treaty mutually to recognize a certain breadth of the territorial sea. And, by analogy, no State could object to the breadth fixed by another for its territorial sea, if it claims an equal or greater breadth for its own.

Criteria for dealing with other situations

When the situation is not one of the above, the validity of an extension of the territorial sea beyond the traditional limit will have to be considered in the light of the two main interests involved in the question, i.e. the special interest or needs of the coastal State an the "general interest", particularly when the latter takes the form of a "acquired right" of third States in the areas of sea covered by this new extension. As far as the first interest in concerned, there can be no doubt that the existence of a national interest or need justifies a claim of this type by the coastal State. In truth, the "historic rights" which certain States are now recognized to have as an adqquate title to the breadth they have given to their territorial sea, or the closing line drawn for certain bays, originally sprang from nothing else than special interests or needs of the States concerned. It would therefore be unjust and illogical to refuse to admit the same situation in the case of those States which, though they cannot claim historic titles, can claim to have present interests and needs which may be vital for their economic development or the feeding of their population. In this connexion we would refer to the considerations put forward with reference to the claims of certain States to the exclusive exploitation of the living resources of certain areas of the sea or of certain species beyond the limit of their territorial waters. If those zones or rights of exclusive exploitation were recognized, the legitimate interests of the coastal State could be served without any need to extend the territorial sea, in an area in which other rights or obligations are involved that are quite unrelated to the specific purpose of the claims.

However, as likewise pointed out when considering these claims, their legitimacy and, consequently, their admissibility, must be conditioned by the existence of the "general interest" in the use and exploitation of the living resources of the high seas. The needs of the coastal State cannot be the sole factor deciding a question in which this "general interest" in normally involved

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

and which at times interests and rights of other States are at stake which are equally or more legitimate than those invoked by the coastal State. The problem, as can be seen, now becomes much more complicated but could likewise be solved in accordance with international law. Once again we find ourselves faced with two possible cases: one in which there is only the "general interest" in the area affected by the extension of the territorial sea, and the other in which "acquired rights" of third States exist in the area. It is only the first case however that could really give rise to difficulties. One would have to weigh the two interests against each other, the "special interest" or the needs of the coastal State and the "general interest" or the needs of the international community with regard to the use and exploitation of the resources to be found in the area of the high seas affected by the extension This could be done either by taking account of the circumstances involved in each particular case and appraising the different needs whose satisfaction is sought, or by fixing a maximum limit beyond which no extension of the territorial sea would be valid. This limit could be of a general kind, to enable a smaller one to be fixed which be in accordance with the special geographical features or established custom of certain areas.

Special position when "historic" fishing rights exist

The second case mentioned naturally does not raise these difficulties; it is the case of a coastal State which, in extending its territorial sea beyond the traditional limit, appropriates areas of the high seas where nationals of a third State have been regularly engaging in fishing from time immemorial. The latter State is then in the position of a holder of a "historic right" of the same kind and validity as that invoked by the coastal States themselves in extending their territorial sea. This is in fact an instance of title by prescription, a State having legitimately acquired a right which the coastal State must respect if it decides to extend its territorial sea. Or, to put things another way, if the new "special interest" of the coastal State in an area traditionally part of the high seas constitutes a legitimate title for widening its territorial sea, the right invoked by a third State whose nationals were exploiting the resources of that area consistently and far earlier must be equally legitimate. As a matter of fact in such cases the interest and the right of the non-coastal State may at times be more legitimate than those of the coastal State itself, as happens, for instance, when the latter's nationals do not engage at all or in only on a small scale fishing in the area in question.

Forms and procedures for the settlement of disputes

In a word, the problem of the breadth of the territorial sea, though complicated, is not impossible to solve. Factors con-

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

tributing to its solution at the present time, in the manner and to the extent we have indicated, are the recognition of the right of the coastal State with respect to the submarine areas adjacent to its territory and the right which it must be acknowledged to have for conservation purposes. The only problems remaining to be settled are the two last-mentioned cases and, in final analysis, only the first of them. But for its settlement, in the event of the States concerned not agreeing, expressly or tacitly, on a solution, there always remains the resort to the means and procedures established by international law for the pacific settlement of conflicts of interests between States.

29. ROLES OF THE PRINCIPLE OF THE FREEDOM OF THE SEAS IN CONTEMPORARY INTERNATIONAL LAW

The need to revise the traditional concept of the freedom of the seas

By way of conclusion to our study it may perhaps be of value to revert to an observation we made at the beginning of the Introduction to the effect that, in the face of the prfound technical and economic transformation that has taken place in recent times, certain traditional concepts and principles of the international law of the sea"will perforce need revising in the light of present needs and interests". As we pointed out at the time, that work of revision has already begun and it should surely be possible to carry it through without relinquishing any of the fundamental postulates of that legal order or depriving any legitimate interest of proper safeguards. The general recapitulation which we have made in the foregoing section has provided an opportunity of confirming both that this work of revision has already been undertaken and also that it has not proved necessary to relinquish the postulates on which the legal regime of the sea was based or to ignore any legitimate interest. This does not however mean that it will be possible in future to continue to conceive of the "freedom of the seas" in traditional terms or that the principle in which it was formulated can continue to play its former function.

Opinion of Professor Gidel

Professor Gidel, the deepest of contemporary thinkers on the subject, has observed in this connexion that "freedom of the high seas was nothing more than a negation; it was the opposite of the idea of sovereignty of the high seas... This idea of freedom of the high sea, although essentially negative, could not fail to have positive consequences. Directed against exclusive use, it necessarily develop into the idea of equal use. Opposition to the establishment of sovereignties over the high seas arises from a desire to make free use of them oneself. Ships of all nationalities have an equal right to make use of the high seas in every

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

possible way, but the idea of equal only comes second." In his view, "the purely negative general concept of freedom of the high seas which confined each individual 'user' of the high seas to an attitude of complete abstention as regards all the others, does not conform to the aspirations of the international community. Such a concept could, very largely, be adapted to the use of the sea as a means of communication. It does not fit in with the use of the sea as a source of wealth." In formulating these remarks, Gidel was guided by the two-fold consideration that the sea is not an inexhaustible source of wealth, and that non-interference, which formerly protected freedom of communications on the high seas, cannot legitimately be invoked to imperil the conservation of the wealth of the high seas.

Position of the International Law Commission

It is this concept of the freedom of the seas that underlies article 27 of the draft submitted by the International Law Commission in its final report to the General Assembly. In the commentary on the article, it points out that "any freedom that is to be exercised in the interest of all entitled to enjoy it, must be regulated. Hence, the law of the high seas contains certain rules, most of them already recognized in positive international law, which are designed, not to limit or restrict the freedom of the high seas, but to safeguard its exercise in the interests of the entire international community." Among these rules it mentions specifically, "the rights of States relative to the conservation of the living resources of the high seas" and "the rights of coastal States with regard to the continental shelf". The regulation of the freedom of the sea formulated by the Commission with respect to the utilization and conservation of its wealth shows in fact that this is the only path to be followed at the present day if the rational exploitation of that wealth is to be ensured and the interests and rights of all are to be safeguarded.

The new conception of the principle of the freedom of the seas

The freedom of the seas, conceived solely as "the opposite of the sovereignty of the sea", involves the idea of absolute freedom of use and exploitation of its resources. As long as those resources were inexhaustible or were not liable to waste, damage or extermination as a result of the means and methods used to exploit them, any form of regulation would have been bound to be unjustified. At the present day, however, especially if the economic and social repercussions of technical advances are born in mind, this concept of the freedom of the seas is logically inadmissible. Even in traditional international law itself the principle of the freedom of the seas as far as it concerns freedom of navigation was not absolutely free from limitations. The

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2

right of boarding and search, the right of pursuit ah other rights which the State was ackhowledged to possess on the high seas clearly show that the possibility of abuse of freedom of navigation had made it necessary to place certain restrictions on the use of the sea as an international highway. Accordingly, the same possibility of abuse of the freedom to use the resources of the seas now makes it necessary to place certain limitations on the exercise of that freedom.

In conclusion we may add that the principle of the freedom of the seas can effectively fulfil its role only if conceived in such terms. In view of the form now taken by the problems relating to the use and conservation of the resources of the sea, it is idle to hope that this principle can continue to serve as a justification for the unrestricted exploitation of such wealth. Quite on the contrary: the experience of recent years shows that it would be by no means going too far to state that the very continued application of the principle may depend on the manner in which the right to exploit that wealth is regulated.

Declassified in Part - Sanitized Copy Approved for Release 2013/06/24 : CIA-RDP81-01043R002000130009-2